MT LEGISLATIVE HISTORY

Chapter 605 1989

Bill H _____ (S) 169 Original bill & hist. ✓ C

H. Committee on Judiciary

Hearing Date(s) Mar 20 ✓ C

_____ ___C

_____ ___C

_____ ___C

Date Out Mar 30 ✓ C

S. Committee on Agriculture, Livestock + Irrigation

Hearing Date(s) Feb 03 ✓ C

Feb 13 ✓ C

_____ ___C

_____ ___C

Feb 13 ✓ C

Did this bill originate in an interim committee? ___Yes ___No

Committee _____ Report _____

SENATE FINAL STATUS

2/21 REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.
2/27 REREFERRED TO JUDICIARY
3/20 HEARING
3/21 COMMITTEE REPORT--BILL CONCURRED AS AMENDED
3/27 2ND READING CONCURRED AS AMENDED 86 8
3/29 3RD READING CONCURRED 74 22

RETURNED TO SENATE WITH AMENDMENTS
4/04 2ND READING AMENDMENTS CONCURRED 49 0
4/06 3RD READING AMENDMENTS CONCURRED 48 1

4/11 SIGNED BY PRESIDENT
4/17 SIGNED BY SPEAKER
4/18 TRANSMITTED TO GOVERNOR
4/20 SIGNED BY GOVERNOR
CHAPTER NUMBER 586 EFFECTIVE DATE: 4/21/89

SB 168 INTRODUCED BY BENGTSON, ET AL.
ALLOW CORRECTION OF CLERICAL MISTAKES IN FINAL DECREES OF WATER RIGHTS

1/17 INTRODUCED
1/17 REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.
2/03 HEARING
2/13 COMMITTEE REPORT--BILL PASSED AS AMENDED
2/15 2ND READING PASSED 50 0
2/17 3RD READING PASSED 50 0

TRANSMITTED TO HOUSE
2/21 REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.
2/27 REREFERRED TO JUDICIARY
3/20 HEARING
3/21 COMMITTEE REPORT--BILL CONCURRED
3/27 2ND READING CONCURRED 90 2
3/29 3RD READING CONCURRED 93 2

RETURNED TO SENATE
3/31 SIGNED BY PRESIDENT
3/31 SIGNED BY SPEAKER
3/31 TRANSMITTED TO GOVERNOR
4/04 SIGNED BY GOVERNOR
CHAPTER NUMBER 426 EFFECTIVE DATE: 10/01/89

SB 169 INTRODUCED BY BENGTSON, ET AL.
PROVIDE FOR TEMPORARY PRELIMINARY DECREES AND FOR OBJECTIONS ON THE DECREES

1/17 INTRODUCED
1/17 REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.
1/19 FISCAL NOTE REQUESTED
1/28 FISCAL NOTE RECEIVED
1/30 FISCAL NOTE PRINTED
2/03 HEARING
2/14 COMMITTEE REPORT--BILL PASSED AS AMENDED
2/16 2ND READING PASSED AS AMENDED 48 0
2/18 3RD READING PASSED 49 0

TRANSMITTED TO HOUSE
2/21 REFERRED TO AGRICULTURE, LIVESTOCK & IRRIG.
2/27 REREFERRED TO JUDICIARY

2

3/20	HEARING		
3/21	COMMITTEE REPORT--BILL CONCURRED AS AMENDED		
3/27	2ND READING CONCURRED AS AMENDED	77	15
3/29	3RD READING CONCURRED	75	21
	RETURNED TO SENATE WITH AMENDMENTS		
4/04	2ND READING AMENDMENTS CONCURRED	49	0
4/06	3RD READING AMENDMENTS CONCURRED	48	0
4/13	SIGNED BY PRESIDENT		
4/17	SIGNED BY SPEAKER		
4/18	TRANSMITTED TO GOVERNOR		
4/21	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 605 EFFECTIVE DATE: 4/21/89		

SB 170 INTRODUCED BY JERGESON, ET AL.
ALLOW DANGEROUS OFFENDER DESIGNATION ON REVOCATION OF PROBATION

1/17	INTRODUCED		
1/17	REFERRED TO JUDICIARY		
1/24	HEARING		
1/26	COMMITTEE REPORT--BILL PASSED AS AMENDED		
1/28	2ND READING PASSED	44	0
1/31	3RD READING PASSED	50	0
	TRANSMITTED TO HOUSE		
2/21	REFERRED TO JUDICIARY		
2/28	HEARING		
3/01	COMMITTEE REPORT--BILL CONCURRED		
3/04	2ND READING CONCURRED	84	1
3/06	3RD READING CONCURRED	91	2
	RETURNED TO SENATE		
3/10	SIGNED BY PRESIDENT		
3/11	SIGNED BY SPEAKER		
3/11	TRANSMITTED TO GOVERNOR		
3/15	SIGNED BY GOVERNOR		
	CHAPTER NUMBER 106 EFFECTIVE DATE: 10/01/89		

SB 171 INTRODUCED BY PINSONEAULT
CLARIFY DUTIES OF FORENSIC SCIENCE AGENCIES AND AGENCY DIRECTORS
BY REQUEST OF DEPARTMENT OF JUSTICE

1/18	INTRODUCED		
1/18	REFERRED TO STATE ADMINISTRATION		
1/23	HEARING		
1/23	COMMITTEE REPORT--BILL PASSED		
1/25	2ND READING PASSED	50	0
1/27	3RD READING PASSED	48	0
	TRANSMITTED TO HOUSE		
2/21	REFERRED TO STATE ADMINISTRATION		
3/07	HEARING		
3/07	TABLED IN COMMITTEE		

SB 172 INTRODUCED BY PINSONEAULT, ET AL.
ESTABLISH AS A CRIME SEXUAL SOLICITATION IN EXCHANGE FOR OR IN ADDITION TO FEES CHARGED FOR

SENATE BILL NO. 169

INTRODUCED BY BENGTSON, GALT, STORY, STIMATZ, SPAETH, MARKS, BRADLEY, IVERSON

IN THE SENATE

JANUARY 17, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON AGRICULTURE, LIVESTOCK & IRRIGATION.
	FIRST READING.
FEBRUARY 14, 1989	COMMITTEE RECOMMEND BILL DO PASS AS AMENDED. REPORT ADOPTED.
FEBRUARY 15, 1989	PRINTING REPORT.
FEBRUARY 16, 1989	SECOND READING, DO PASS AS AMENDED.
FEBRUARY 17, 1989	ENGROSSING REPORT.
FEBRUARY 18, 1989	THIRD READING, PASSED. AYES, 49; NOES, 0.
	TRANSMITTED TO HOUSE.

IN THE HOUSE

FEBRUARY 18, 1989	INTRODUCED AND REFERRED TO COMMITTEE ON AGRICULTURE, LIVESTOCK & IRRIGATION.
FEBRUARY 20, 1989	FIRST READING.
FEBRUARY 27, 1989	ON MOTION, TAKEN FROM AGRICULTURE AND REREFERRED TO COMMITTEE ON JUDICIARY.
MARCH 21, 1989	COMMITTEE RECOMMEND BILL BE CONCURRED IN AS AMENDED. REPORT ADOPTED.
MARCH 27, 1989	SECOND READING, CONCURRED IN AS AMENDED.
MARCH 29, 1989	THIRD READING, CONCURRED IN. AYES, 75; NOES, 21.

RETURNED TO SENATE WITH AMENDMENTS.

IN THE SENATE

APRIL 4, 1989 — RECEIVED FROM HOUSE.

SECOND READING, AMENDMENTS CONCURRED IN.

APRIL 6, 1989 — THIRD READING, AMENDMENTS CONCURRED IN.

SENT TO ENROLLING.

REPORTED CORRECTLY ENROLLED.

LC 0683/01

SENATE BILL NO. 169

INTRODUCED BY Bengtson Galt Story Stewart Spaeth Marks Bradley Iverson

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A WATER JUDGE MAY ISSUE A TEMPORARY PRELIMINARY DECREE IN THOSE BASINS IN WHICH ADJUDICATION OF CLAIMS FOR FEDERAL OR INDIAN WATER RIGHTS IS PRECLUDED BY THE SUSPENSION OF ADJUDICATION UNDER 85-2-217; PROVIDING FOR OBJECTIONS AND HEARINGS ON TEMPORARY PRELIMINARY DECREES; INCREASING THE TIME LIMIT FOR REQUESTING A HEARING ON A TEMPORARY PRELIMINARY DECREE OR A PRELIMINARY DECREE; AMENDING SECTIONS 85-2-231 THROUGH 85-2-233, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-231, MCA, is amended to read:

"85-2-231. ~~Preliminary~~ Temporary preliminary and preliminary decree. (1) (a) The water judge shall issue a preliminary decree. The preliminary decree shall be based on:

~~(a)~~(i) the statements of claim before the water judge;

~~(b)~~(ii) the data submitted by the department;

~~(c)~~(iii) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and

~~(d)~~(iv) any additional data obtained by the water judge.

(b) The preliminary decree shall be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon thereafter as is reasonably feasible.

(c) This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree, pursuant to 85-2-321 or as provided in subsection (5) of this section, or if such a decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree.

(2) A preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply of water, at a time different from the issuance of other preliminary decrees or portions of the same decree.

(3) The preliminary decree shall contain the information and make the determinations, findings, and conclusions required for the final decree under 85-2-234. The water judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency.

Montana Legislative Council

INTRODUCED BILL
SB 169

(4) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree set forth in subsections (1) and (3)~~,~~ and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree.

(5) In a basin in which adjudication of claims for federal or Indian water rights is precluded by the suspension of adjudication under 85-2-217, the water judge may issue a temporary preliminary decree in accordance with the requirements of this section. The temporary preliminary decree shall address all claims in the basin except those affected by the suspension required by 85-2-217.

(6) In issuing a subsequent preliminary decree, the water judge shall use the temporary preliminary decree issued under subsection (5). The preliminary decree, when issued, shall supersede and replace the temporary preliminary decree."

Section 2. Section 85-2-232, MCA, is amended to read:

"**85-2-232. Availability of** temporary preliminary or **preliminary decree.** (1) The water judge shall send to the department a copy of ~~the~~ any temporary preliminary decree or

preliminary decree ~~to the department~~ issued for a subbasin, and the water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to each person who has filed a claim of existing right within the decreed subbasin and to the purchaser under contract for deed, as defined in 70-20-115, of property in connection with which a claim of existing right has been filed within the decreed subbasin or, in the Powder River Basin, to each person who has filed a declaration of an existing right. The water judge shall enclose with the notice an abstract of the disposition of such person's claimed or declared existing right. The notice of availability shall also be served upon those issued or having applied for and not having been denied a ~~beneficial water use~~ permit to beneficially use water within the decreed subbasin pursuant to Title 85, chapter 2, part 3, those granted a reservation within the decreed subbasin pursuant to 85-2-316, or other interested persons who request service of the notice from the water judge. The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of the temporary preliminary decree or preliminary decree. Such certificate shall be

conclusive evidence of due and legal notice of entry of decree.

(2) Notice of the availability of a temporary preliminary decree or preliminary decree must also be published at least once each week for 3 consecutive weeks in at least three newspapers of general circulation which in total cover the water division or divisions in the general stream basin in which the decreed subbasin is located.

~~(2)~~(3) Any person may obtain a copy of the temporary preliminary decree or preliminary decree upon payment of a fee of $20 or the cost of printing, whichever is greater, to the water judge."

Section 3. Section 85-2-233, MCA, is amended to read:

"85-2-233. Hearing on temporary preliminary decree or **preliminary decree.** (1) (a) ~~Upon objection to the~~ For good cause shown, a hearing shall be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by:

(i) the department~~,~~;

(ii) a person named in the temporary preliminary decree or preliminary decree~~,~~; or

(iii) any ~~other~~ person~~,--for--good--cause--shown,-the department-or-such-person-is-entitled-to-a--hearing--thereon before--the--water--judge,~~ within the subbasin entitled to receive notice under 85-2-232(1); or

(iv) any other person who claims rights to the use of water from sources in other subbasins that are hydrologically connected to the sources within the decreed subbasin and who would be entitled to receive notice under 85-2-232 if his claim or claims were from sources within the decreed subbasin.

(b) No objection seeking to reopen and review any matter previously litigated and resolved as the result of any previous objection process is allowed, unless the objection is by an Indian tribe or federal agency that commenced negotiations pursuant to 85-2-702 or 85-2-703 at the time the matter was litigated. A tribe or federal agency that commenced negotiations at the time the matter was litigated is entitled to the benefits of the suspension provided under 85-2-217.

(2) If a hearing is requested, ~~such~~ the request must be filed with the water judge within ~~90~~ 180 days after ~~notice--of~~ entry of the temporary preliminary decree or preliminary decree. The water judge may, for good cause shown, extend this time limit ~~an~~ up to two additional ~~90 days~~ 90-day periods if application for ~~the~~ an extension is made within ~~90~~ 180 days after notice of entry of the temporary preliminary decree or preliminary decree.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the temporary

preliminary decree or preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the temporary preliminary decree or preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

(5) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or 85-2-703 bars any subsequent cause of action in the water court.

(6) If the court sustains an objection to a compact, it may declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the

tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required under this subsection."

NEW SECTION. **Section 4. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 5. Effective date.** [This act] is effective on the latest date on which any of the following occur:

(1) passage and approval of [this act], __Bill No.__ [LC 684], __Bill No.__ [LC 685], or __Bill No.__ [LC 686]; or

(2) a final determination of failure to receive passage and approval of __Bill No.__ [LC 684], __Bill No.__ [LC 685], or __Bill No.__ [LC 686].

NEW SECTION. **Section 6. Applicability.** [This act]

applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act].

-End-

STATE OF MONTANA - FISCAL NOTE
Form BD-15

In compliance with a written request, there is hereby submitted a Fiscal Note for SB169, as introduced.

DESCRIPTION OF PROPOSED LEGISLATION:

An Act providing that a water judge may issue a temporary preliminary decree in those basins in which adjudication of claims for federal or Indian water rights is precluded by the suspension of adjudication under 85-2-217; providing for objections and hearings on temporary preliminary decrees; increasing the time limit for requesting a hearing on a temporary preliminary decree or a preliminary decree; amending Sections 85-2-231 through 85-2-233, MCA; and providing an effective date and an applicability date.

FISCAL IMPACT: None

Ray Shackleford 1/27/89

RAY SHACKLEFORD, BUDGET DIRECTOR DATE
OFFICE OF BUDGET AND PROGRAM PLANNING

Esther G. Bengston 1-28-89

ESTHER G. BENGSTON, PRIMARY SPONSOR DATE

Fiscal Note for SB169, as introduced

SB 169

CHAIRMAN--TOM BECK
SECRETARY-JAELENE JOHNSON
NORMAL SCHEDULE==> SITE: ROOM 413/415

COMMITTEE--(S) AGRICULTURE
DAYS: M,W,F TIME: 1:00 P.M.

OFFICE--ROOM 439

NOTE: BILL WILL BE LISTED TWICE IF REREFERRED BACK TO THE SAME COMMITTEE

BILL	REFER DATE	LATEST DATE/ACTION ON BILL	
SB 13	01/02	04/24--TABLED IN COMMITTEE SPONSOR: WEEDING, CECIL	TITLE-INTERSTATE COMPACT ON AGRICULTURAL GRAIN MARKETING
SB 28	01/02	03/08--(H) TABLED IN COMMITTEE SPONSOR: MEYER, DARRYL	(H) AGRICULTURE, LIVESTOCK & IRRIG TITLE-CLARIFY DEFINITION OF VETERINARY MEDICINE
SB 32	01/02	04/24--TABLED IN COMMITTEE SPONSOR: JENKINS, LOREN	TITLE-PROVIDE DISTRIBUTION OF CONSERVATION RESERVE PROGRAM RENTAL PAYMENTS
SB 32	01/12	04/24--TABLED IN COMMITTEE SPONSOR: JENKINS, LOREN	TITLE-PROVIDE DISTRIBUTION OF CONSERVATION RESERVE PROGRAM RENTAL PAYMENTS
SB 57	01/03	03/20--(S) CHAPTER NUMBER SPONSOR: JENKINS, LOREN	EFFECTIVE DATE: 03/18/89 TITLE-AMEND CUSTOM COMBINERS' TAX
SB 81	01/07	03/22--(S) CHAPTER NUMBER 1/10 rereferred to Highways SPONSOR: PINSONEAULT, DICK	EFFECTIVE DATE: 03/22/89 TITLE-CONTINUE PROVISION PRECLUDING HIGHWAY RESTRICTIONS ON HAULING AGRI. SEEDS
SB 111	01/~~15~~ 25	04/25--(S) SIGNED BY PRESIDENT SPONSOR: BOYLAN, PAUL	TITLE-GENERALLY REVISE PRACTICE OF VETERINARY MEDICINE
SB 111	02/13	04/25--(S) SIGNED BY PRESIDENT SPONSOR: BOYLAN, PAUL	TITLE-GENERALLY REVISE PRACTICE OF VETERINARY MEDICINE
SB 166	01/17	04/21--(S) CHAPTER NUMBER SPONSOR: BENGTSON, ESTHER	EFFECTIVE DATE: 04/21/89 TITLE-PROVIDES FOR ADMINISTRATION OF TEMPORARY PRELIMINARY AND PRELIMINARY DECREES
SB 167	01/17	04/20--(S) CHAPTER NUMBER SPONSOR: BENGTSON, ESTHER	EFFECTIVE DATE: 04/21/89 TITLE-REOPENS WATER RIGHT DECREES FOR OBJECTIONS ON ISSUES NOT PREVIOUSLY RESOLVED
SB 168	01/17	04/04--(S) CHAPTER NUMBER SPONSOR: BENGTSON, ESTHER	EFFECTIVE DATE: 10/01/89 TITLE-ALLOWS CORRECTION OF CLERICAL MISTAKES IN FINAL DECREES OF WATER RIGHTS
SB 169	01/17	04/21--(S) CHAPTER NUMBER SPONSOR: BENGTSON, ESTHER	EFFECTIVE DATE: 04/21/89 TITLE-PROVIDES FOR TEMPORARY PRELIMINARY DECREES AND FOR OBJECTIONS ON THE DECREES
SB 176	01/18	03/20--(S) CHAPTER NUMBER SPONSOR: DEVLIN, GERRY	EFFECTIVE DATE: 10/01/89 TITLE-IMPOSE $25 LATE PAYMENT PENALTY ON STATE AGRICULTURAL AND GRAZING LEASES
SB 183	01/18	03/18--(S) CHAPTER NUMBER SPONSOR: ABRAMS, HUBERT	EFFECTIVE DATE: 03/18/89 TITLE-INCLUDES LITTLE MISSOURI RIVER BASIN IN THE WATER RESERVATION PROCESS
SB 213	01/21	03/20--(S) CHAPTER NUMBER SPONSOR: HOFMAN, SAM	EFFECTIVE DATE: 10/01/89 TITLE-INCREASING THE ALLOWABLE SEED OR GRAIN LIEN TO AMOUNT OF PURCHASE PRICE
SB 222	01/25	03/20--(S) CHAPTER NUMBER SPONSOR: TVEIT, LARRY	EFFECTIVE DATE: 10/01/89 TITLE-PASSING OF TITLE TO CATTLE FROM AUCTION YARD
SB 228	01/25	04/24--TABLED IN COMMITTEE SPONSOR: HAGER, TOM	TITLE-KILLING DOGS THAT DESTROY OR MAIM POULTRY
SB 233	01/25	03/20--(S) CHAPTER NUMBER SPONSOR: MANNING, DICK	EFFECTIVE DATE: 03/20/89 TITLE-AUTHORIZE MULE RACING
SB 254	01/26	04/24--TABLED IN COMMITTEE	

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE

Call to Order: By Chairman Tom Beck, on February 3, 1989, at 1:00 P.M.

ROLL CALL

Members Present: Senators: Hubert Abrams, Gary Aklestad, Esther Bengtson, Gerry Devlin, Jack Galt, Greg Jergeson, Gene Thayer, Bob Williams, and Chairman Beck

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council
Debbie Thompson transcribed the minutes

Announcements/Discussion: None

HEARING ON SENATE BILL 169

Presentation and Opening Statement by Sponsor: Senator Bengtson presented the water rights bills as a package. She presented testimony on Some Basics concerning the Water Rights Adjudication Process (Exhibit 1). She said this explained the division of the Montana water courts, the current adjudication laws, review of claims, and the issuing of decrees by the water courts.

Senator Bengtson discussed the water rights adjudication bills by request of the Water Policy Committee (Exhibit 2). She explained the hiring of the consultant firm of Saunders, Snyder, Ross & Dickson to evaluate the adjudication process and make recommendations. She said the package of four bills, SB 169, SB 166, SB 167, and SB 168 were a result of these recommendations.

List of Testifying Proponents and What Group They Represent:

Jack Ross representing Saunders, Snyder, Ross & Dickson
Jo Brunner representing Montana Water Resource Committee
Carol Mosher representing Montana Stockgrowers and CattleWomen and the Montana Association of State

Grazing Districts
Lorna Frank representing Montana Farm Bureau
Ed Steinmetz representing Montana Water Court

List of Testifying Opponents and What Group They Represent:

Don MacIntyre representing Department of Natural Resource and Conservation

Testimony:
Proponents:

Mr. Jack Ross, member of the firm of Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado, testified in support of the bills. He said that his firm was the one employed by the Water Policy Committee to make a review of the adjudication process. He made a brief statement of why the recommendations had been made.

Mr. Ross said the Colorado water rights adjudication system was similar to the Montana system. His firm has over 128 years of actual experience in adjudicating water rights and has seen most of the problems emerge when one tries to adjudicate rights. They were able to bring to the study their background on the issue to the Water Policy Committee.

The consulting firm did not conclude that the Montana system required a massive overhaul or change, but did suggest some fine tuning. He said if the process worked better it would assure that when the person has his water right decreed and had been through the entire process, he would know that it is going to be a valid water right throughout the entire watershed in which his subbasin was located.

Mr. Ross said that SB 169 does two things of real substance. The first one is that it gives legislative approval to the historic practice of water courts entering temporary preliminary decrees. He said the statute provides for preliminary decrees, but in those subbasins where the adjudication process has been suspended because of the existence of federal or Indian claims, courts were confronted with the problem of what they do when they got through with their work. They couldn't enter a preliminary decree until they had the federal and Indian claims to blanket into it, so they hit upon the technique of

using temporary preliminary decrees. Since there was some question about the status of the temporary decrees, it was the judgment of the firm to have the legislature say it was a sound practice.

Mr. Ross said that the second thing the bill does, which is critically important to the viability of the whole process, is the expansion of notice. Under the current practice, notice of the issuance of a temporary decree or a temporary preliminary decree is heard by mail only to those people who are located within the subbasin where that decree is issued, even though water rights decreed in that subbasin may have an effect on the availability of water to owners of water rights of other subbasins in the same watershed. The owners of those rights in the other subbasins do not under the current statute receive adequate notice; this would give them an opportunity to come in and to protest, if need be, decrees in a particular subbasin. So the second feature, which is to expand the notice and to make that notice one of a published notice in the rest of the watershed, is in our view very much of a necessity for this process to move forward and have ultimate finality, so people can't many years from now question the adequacy or legitimacy of the decree.

Mr. Ross said that the one issue that arose in connection with expanding the notice to other basins dealt with the question of what happens when someone has already litigated an issue. The firm attempted to deal with that in the portion of page 6 of the bill under section 3, (b). He pointed out that lawyers that work on legislation can go back the day after the original piece and would like to improve it. He offered a recommendation to the committee to make an additional amendment to the bill as it is presented (Exhibit 3). He said the reason for the amendment was the problem that if you read the language too precisely you wouldn't be able to have an extension for the second 90 days unless application was made before the expiration. This amendment will clarify that.

Because of the number of claims that may need to be considered and claimants from other subbasins, it was the firm's judgment that the time needed to be expanded to allow for people to review those claims in other basins and respond to them. This

section does that by giving an opportunity for the total period of time for an objection to be heard to be as much as a year. With that set of changes it will strengthen that part of the adjudication process and bring you to a point where you can be sure that the decrees finally issued and finally resolved will have a much stronger and better capability of being protected against attack.

Jo Brunner, Executive Secretary for the Montana Water Resource Association, testified in support of the bill. She said her association supported the bill with the exclusion of one paragraph, Section 3, paragraph (1) and subparagraph (b), lines 7-15. (Exhibit 5)

Carol Mosher, Montana Stockgrowers and Montana Cattlewomen, testified in support of the bill (Exhibit 4). She said there has always been a question and the bill seems to codify the power they are asking for. She asked if there was a chance of getting some written testimony to the committee before executive action is taken; due to the weather they could not bring in their people for expert testimony.

Lorna Frank, representing the Montana Farm Bureau, spoke in support of SB 169.

Ed Steinmetz, water master for the Montana water court, testified in favor of legislation authorizing temporary preliminary decrees. He said there were certain sections that would need to be amended. The first section was Section 1, subsection (5) that appears on page 3. The particular concern was the last line that states that preliminary decrees shall address all claims in the basin except those affected by the extension. He said the temporary preliminary decree now just addresses those claims which are based on the state laws of Montana. He said they do find that there are several basins throughout the state that do have federal reserved water rights which will never be submitted to the compact commission. They contacted the federal government and they do not intend to litigate these rights. "It is our view that those rights should not be included until we get to the preliminary decree stage." This language would require us to include those types of claims at the temporary stage. His concern was that those federal reserved rights are

entirely different and are based on federal law and have no relation to state law. He feels it would confuse the process to require those federal claims to be included at the temporary decree stage.

He recommended language to clear this issue up. It could read "the temporary preliminary decree shall address all claims in the basin which are based upon the laws of the state of Montana". In Section 1, subsection (6), he recommended striking the first sentence and just using the last, and just say that the preliminary decree when issued shall supersede and replace the temporary.

The next comment on Section 2, subsection (2), on page 5, was concerning the provision dealing with the notice. He said these comments tie in with the comments on SB 167. "It is our idea, is that what Mr. Ross is saying is that you have to give people in all of these other basins throughout the water divisions one fair shot. And we don't think that it is necessary that you have to give this division-wide notice at the temporary preliminary decree stage; we would rather keep the adjudication of the basin more localized, take care of the problems within that basin, when you go to preliminary decree at that time you can provide your division-wide notice and properly bring in everybody else in the water division. Economically that would be cheaper and would also let the process adjudicate faster at the temporary preliminary decree stage."

Mr. Steinmetz' other comment addressed Section 3, subsection (b), which is the section on reviewing the objections. "If you wait until the preliminary decree stage before providing the notice division-wide, I think it is very important that you don't exclude any persons in these other basins who haven't had notice or an opportunity to participate. In my own mind, I would prefer to see some language that says if people had notice of that particular decree and have had an opportunity to participate, they are now precluded from coming back in. What that would do is allow all of these other people in these other basins who haven't had notice or an opportunity to come back in. The concern there is that you don't want these claimants who have had to go through one litigation to keep litigating the same issues. If you didn't require the division-wide notice until

the preliminary decree and then you limited objections to those that had notice and opportunity, that would take care of the concerns of the claimant that it would not have to be re-litigated."

Testimony:
Opponents:

Don MacIntyre, DNRC, testified against the bill generally and against the objection process in particular. His concern was that by limiting the objection procedure prior to the final decree determination, the due process rights of water users who chose to wait would be impaired.

Questions from the Committee:

Senator Galt asked Mr. Ross, "In case Fort Peck will be entered into court, will that take precedence or stand up, be opened up?" Mr. Ross replied that under the provisions of the statute, the other water, users have a right to appear, given the legislatures approval.

Senator Aklestad asked if most of this information had come out at the previous water hearings. Mr. Ross replied that new information had come out in these hearings. Senator Aklestad asked, "If the bill was killed what would happen?" Mr. Ross said he believed that the issue would not have been addressed to protect the decrees against challenge of water users in other subbasins within a watershed. "As it stands now, a water user in another basin who has not received notice may be able to come in at any time and challenge a decree issued in another subbasin. This mechanism provides a vehicle for saying to him, there has to be finality." At the present time there is a serious due process issue with respect to people who have water rights in other subbasins and have no current opportunity to appear in the proceedings and haven't appeared in the past. Ultimately you are going to have to integrate water rights on every major watershed among each subbasin. This bill provides a vehicle for getting that done so you don't have somebody coming in to spoil it later on."

Senator Aklestad asked if they could challenge on old issues. Mr. Ross explained that if you have a water right and go through the procedure, you get

a decree from the court. The noted provision like in this bill is not available, that you tell someone in the subbasin upstream about your decree, it is our judgment that your decree is not safe against that upstream person unless they are notified and given a deadline.

Senator Galt asked Mr. MacIntyre about his objection to the whole bill from DNRC, "But the only thing you have to be concerned about is that you think the objection that the preliminary decree is done away with if they haven't protested the temporary?" Mr. MacIntyre replied that temporary preliminary decrees are a valuable tool. "By requiring the finality, Mr. Ross speaks of, this stage creates a hardship on non-Indian, nonfederal water districts. Some point in time, he is absolutely right, that integration has to take place. The water court spends much of its time in temporary preliminary decrees and preliminary decrees. By going through that process, people are given an indication of what their rights are. Given that indication, they will be in a better position when it comes to integration to make objections. So what it is really saying is the finality problem can be dealt with later. The water court should be left with the flexibility to try and integrate those without trying to put that kind of restriction on it. With respect to subsection (b) the objections, we are adamantly opposed to that. That is a key portion of this bill which would in fact cut off rights of those who might otherwise object if they had a better idea of what the water rights were. For example, you're a basin that does not have a preliminary decree on it, but you are in a basin that could be affected by that. All you have is your statement claim to go on, those are all your neighbors in your basin. Temporary preliminary decree comes out in the other basin and you ask yourself or your counselor or engineer, 'What effect does it have on my rank?' The attorney will say, 'I can't tell you with great assurance what effect it has on your rights because I don't know. I do know what your statement of claim says is limiting your right; how does it affect by up here? If I had a preliminary temporary decree on my rights and this other one came out, I would be in a much better position. I have a little better definition of what your right is now, how its affected in that basin, how its affected outside that basin.' What we are seeing is a wild temporary preliminary

decree, preliminary decrees to continue but don't go to the final decree stage until it is necessary to integrate the water rights within the state of Montana. Then if you pass SB 166, which I think is the most critical of all the bills you have, it gives the courts and the water commissioners the power to administer the water rights that are in a temporary preliminary decree, then those parties in the basin that have chosen to put themselves in and have those water rights administered as found by the water court at that period of time in history. When the state reaches that point in time when there is sufficient preliminary temporary decrees, that translates a more well defined--you'll have to bring them in if you can't settle what the contract is. At that point in time you can go with final decrees. I am afraid of what this bill is now with only 28 temporary preliminary decrees and 7 final out of 80 some. We are now going to say we are cutting off rights. You've got to get involved right now if finality is going to take place in the near future." He pointed out that the federal rights touch upon almost every basin in the state. "You may find that once those compacts are entered and the federal rights are determined, you have a little better handle on it. This is not the mechanism you want to choose at this time. Due process requires that you tell people that they have an opportunity and if they don't take advantage of it, it is cut off."

Senator Bengtson asked Mr. Steinmetz about the relationship of always issuing temporary preliminary decrees, "Or do you sometimes go right on to preliminary decrees?" Mr. Steinmetz said, "If they have a basin that doesn't have federal or Indian reserve rights that are before the compact commission, we can start right out with the preliminary decree, but again only about 11 out of the 85 basins are in that situation. The other 72 do appear to contain some form of federal or Indian reserved right."

Mr. Steinmetz clarified a previous question by Senator Aklestad. He said that state people had an opportunity to object at the preliminary decree stage of all the Indian and federal compact. "What the law says is that the water court can throw out the compact; we cannot alter the terms, we either have the option to uphold the compact or

to throw it out. The state-based claimants are going to have an opportunity at the preliminary decree stage to object to that. Also at that time your federal and Indian rights claimants also have an opportunity to object to any state-based claim they want. Again there has to be good cause for their objection."

Closing by Sponsor:

Senator Bengtson said the reason is to cooperate with the water courts and get some finality to these decrees. "The big problem was whether the water courts were making any progress. The objections that were being filed by the departments of state agencies was part of the problem. We have addressed this as trying to get the job done. It is expansion of the notice, taking into account those subbasins. They are all interrelated. We have addressed the problem and will consider taking out some of the language. However, I object to taking out the language that says that after you have had your objections litigated that you should not be able to reopen that. That means that can go on and on forever. We have to have some finality."

HEARING ON SENATE BILL 166

Presentation and Opening Statement by Sponsor:

Senator Bengtson said this bill enables the District Court to administer or enforce water rights according to a temporary preliminary decree as modified after hearings and objections or a preliminary decree under existing law, so that final decrees may be administered, thereby, emphasizing the court's adjudicating function. The water courts will not be administering the decree, it will be the District Court. Sections 1 and 8 strike references to section 3-7-213, which provides for designation of all the judges by the water judge from the population of District Court and retired District Court Judges. This change still allows a water judge from another division to sit as water judge if requested by the Chief Justice of the Supreme Court or the water judge pursuant to subsection (2) of this section. That language is a little bit hard to understand. It takes away the ability of the water judge to

ROLL CALL

AGRICULTURE COMMITTEE

DATE 2/3/89

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTSON	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGESON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

EXHIBIT NO. 1
DATE 2/3/89
BILL NO. SB169 SB16 SB167 SB168

SOME BASICS CONCERNING THE WATER RIGHTS ADJUDICATION PROCESS

February 1989

1. The Montana Water Courts are organized into four divisions:

   - the Upper Missouri River Basin (Chief Judge W.W. Lessley);
   - the Lower Missouri River Basin (Judge Bernard W. Thomas);
   - the Clark Fork River Basin (Judge Leif Erickson); and
   - the Yellowstone River Basin (Judge Roy C. Rodeghiero).

2. The current adjudication laws went into effect with the passage of Senate Bill 76 in 1979. The deadline for filing claims of existing (pre-July 1, 1973) rights was April 30, 1982. Over 203,000 claims were filed.

3. Since 1982, the Water Courts have been reviewing the claims and issuing decrees in various subbasins. There are 85 subbasins in Montana.

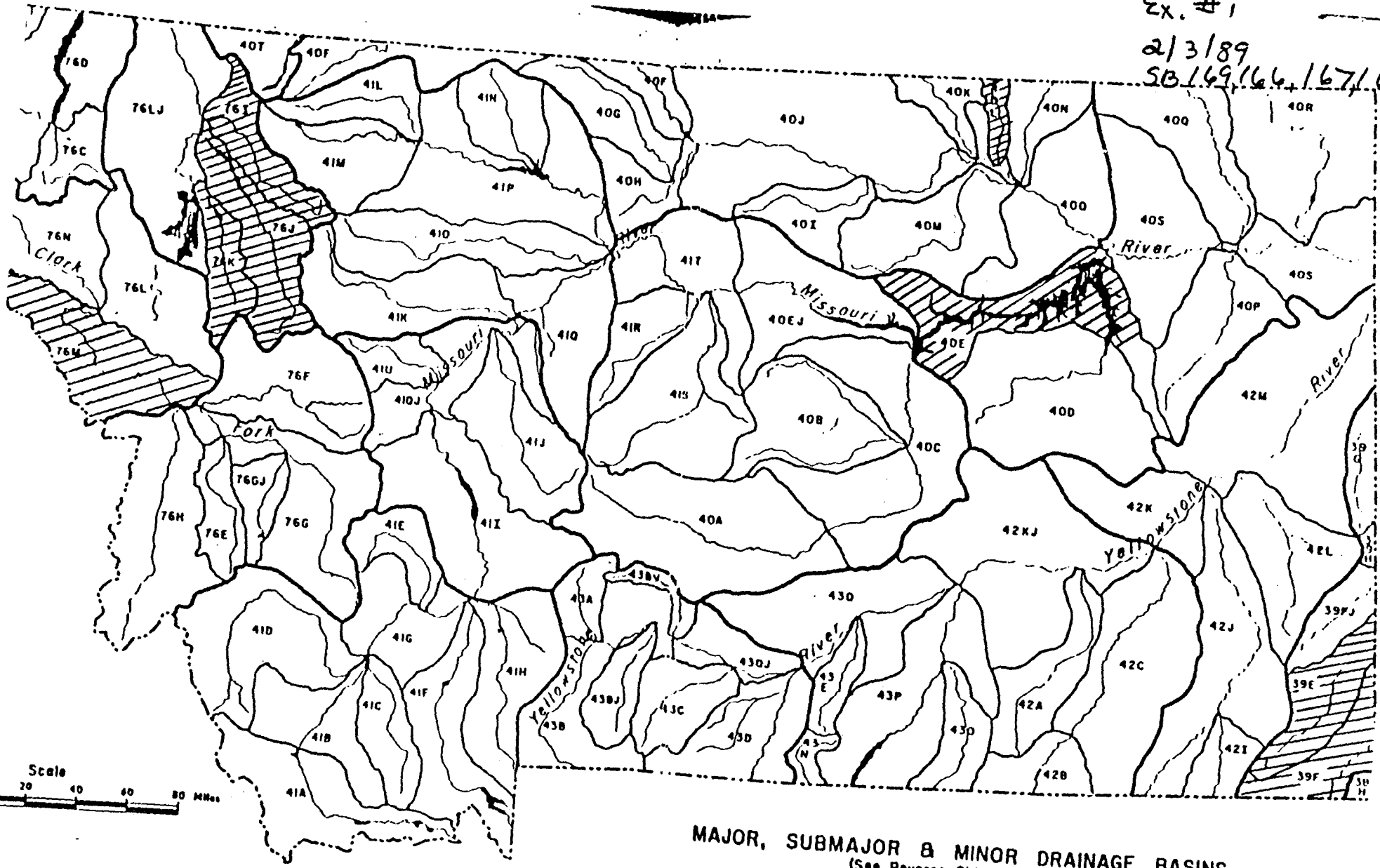
4. The Water Courts issue three types of decrees. A temporary preliminary decree is issued for non-federal and Indian claims in any basin where the federal and Indian claims remain unresolved because of negotiations with the Reserved Water Rights Compact Commission. A preliminary decree is issued when all claims (state-based and federal and Indian claims) are before the court. Senate Bill 169 ensures that both of these decrees are subject to extensive notice and opportunity for objections and hearings.

Finally, after considering all objections and the evidence before it, the Water Court issues a final decree.

5. The Department of Natural Resources and Conservation is required to assist the Water Courts. The DNRC's functions include maintaining the data base and examining claims for accuracy. Claim examination normally involves in-house review, including air photo interpretation, but can at times involve examination by field office staff at the site of the claim.

6. With funding from a special appropriation, the Water Policy Committee hired Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado to examine the water rights adjudication process to determine if it is legally adequate, particularly if a challenge occurred under the McCarran Amendment (which allows states to adjudicate federal and Indian claims).

Ex. #1
2/3/89
SB 169, 166, 167, 168



MAJOR, SUBMAJOR & MINOR DRAINAGE BASINS
(See Reverse Side for Index)

SENATE AGRICULTURE
EXHIBIT NO. 2
DATE 2/3/89
BILL NO. SB 169 SB 1
SB 167 SB 162

The Water Rights Adjudication Bills

By Request of the Water Policy Committee
Senator Esther Bengtson, sponsor

The Water Policy Committee's principal agenda item for the 1987-1989 interim was Montana's water rights adjudication process. This focus resulted from an appropriation by the 1987 Legislature to hire a consultant with no conflict of interest to review and analyze the adjudication process.

The consultant -- Saunders, Snyder, Ross & Dickson, P.C. of Denver, Colorado -- evaluated the adjudication process for over a year and delivered a comprehensive set of recommendations. Many of the recommendations stressed very positive aspects of the current adjudication, assuring the committee that the the process is not "so grievously flawed as to require a massive legislative overhaul." The consultant did, however, recommend some minor legislative fine-tuning to ensure the results sought by the legislature in 1979 are achieved.

The committee seriously considered the consultant's recommendations and proposed legislation. The result of its deliberations is contained in the committee report and a legislative package of four bills.

I. Senate Bill 169

Senate Bill 169 provides explicitly that the Water Courts may issue temporary preliminary decrees (a practice already occurring) and makes certain modifications to the notice requirements and to the objections and hearings process.

Section 1

Subsection 5 states that a temporary preliminary decree may be issued in a basin where adjudication of federal and Indian claims is precluded by the suspension under 85-2-217. The suspension is provided so that the Reserved Water Rights Compact Commission may attempt to negotiate a settlement of these rights with the various federal and Indian entities.

Subsection 6 describes the relationship between the temporary preliminary decree and preliminary decree. The temporary preliminary decree must be used in issuing the preliminary decree, but upon issuance the preliminary decree supercedes the temporary preliminary decree.

Section 2

This section describes new notice requirements for temporary preliminary decrees and preliminary decrees. Notice by mail must be sent to each person or entity with a claim, permit or

reservation in the subbasin at issue. In addition, notice of the decree's availability must be published in at least 3 newspapers geographically distributed in the general basin in which the subbasin is located.

Section 3

The hearings process is identical for temporary preliminary and preliminary decrees. As stated in subsection (1) of the bill, the DNRC and persons within the entire basin, including the subbasin, may object to claims in the decree at issue. However:

> no objection seeking to reopen and review any matter previously litigated and resolved as a result of any previous objection process is allowed." (p. 2, lines 4-6)

The exception provided for the federal government and the Indian tribes is necessary because of the ongoing negotiations with these entities by the Reserved Water Rights Compact Commission.

Subsection 2 extends the time period for filing objections and requests for hearing to 180 days after notice is given of the decrees. Two 90-day extensions, for good cause shown, are also provided. This helps to ensure that adequate time is available for interested parties to review the decree.

The amendments in the remainder of the section simply apply existing law to temporary preliminary decrees.

The effective date for this bill and Senate Bills 166, 167, and 168 is when the last bill is passed and approved (or killed).

II. Senate Bill 166

This bill enables the district courts to administer or enforce water rights according to a temporary preliminary decree, as modified after hearings and objections, or a preliminary decree. Under existing law, only final decrees may be administered.

The bill also removes water rights administration from the water courts, thereby emphasizing the courts' principal adjudication function.

Sections 1, 4 and 8

Sections 1 and 8 strike references to section 3-7-213, MCA, which provides for designation of alternate judges by the water judge from the population of district court and retired district court judges. This change still allows a water judge from another division to sit as a water judge if requested by the chief justice of the Supreme Court or the water judge pursuant to subsection (2) of this section.

Section 2

Section 3-7-211 is amended so that exclusive authority for administration of decrees lies with the district courts and not the water courts. The amendment emphasizes the role of the water courts in adjudicating existing water rights, not administering water rights. Water commissioners appointed by the district court have authority to distribute water according to the terms of the decree.

Section 3

This section is fundamental to this bill. Note that the district court has jurisdiction and that the court can administer not only a final decree but also temporary preliminary and preliminary decrees.

Section 5

Under existing law (85-2-227), a properly filed claim of existing right constitutes prima facie proof of its content until a final decree is issued. This amendment modifies the prima facie status of a claim for administration purposes only by stating that the claim is superceded by the issuance of a temporary preliminary decree as modified after hearings and objections or by a preliminary decree. The change ensures that rights will be administered according to the most accurate determination available.

Section 6

This section describes a process for resolving water distribution controversies. Again, the district courts supervise this process. However, if the matter involves an existing (pre-July 1, 1973) water right that has not been adjudicated in a final decree, the part of the controversy involving the determination of the pre-1973 right is referred to the water courts. The water court resolves the matter and then refers it back to the district court for inclusion with other matters concerning the controversy. The district court then administers the decree.

Section 7

Note the amendment to subsection (2), which provides for appointment of water commissioners upon application by the DNRC in areas or basins that have a temporary preliminary decree, preliminary decree or final decree. Subsection (1), which provides for water commissioners upon petition of water right holders, is not amended because it references any "decree".

Ex. #2
2/3/89

III. Senate Bill 168

With certain limitations, this bill reopens all temporary preliminary decrees, preliminary decrees, and final decrees that have been issued by the Water Courts for reexamination and objections. Section 1 of the bill would be a new section in Title 85, chapter 2, part 2 (the adjudication laws).

Subsection 1

This subsection calls for reopening of all decrees within 180 days after this bill is enacted.

Subsection 2

The notice and hearings process is identical to the process provided for temporary preliminary and preliminary decrees. The DNRC, and persons within the entire basin (including the subbasin) may object to claims in the decree at issue. However:

> no objection seeking to reopen and review any matter previously litigated and resolved as a result of any previous objection process is allowed." (p. 2, lines 4-6)

The exception provided for the federal government and the Indian tribes is necessary because of the ongoing negotiations with these entities by the Reserved Water Rights Compact Commission.

Subsections 3 and 4

Notice requirements for the reopening of a decree is identical to notice provided for new temporary preliminary and preliminary decrees (see section 2, Senate Bill 169).

Subsection 5

A 180-day time period, with possibly two 90-day extensions, is provided for objections. Again, this matches the time period for new temporary preliminary and preliminary decrees (see section 2, Senate Bill 169).

Subsections 6 and 7

Subsection 6 ensures notice to claimants of objections to their claims. Subsection 7 allows the water judge to dismiss the objection or to modify claims based on the evidence before him.

Subsections 8

Appeals are allowed from the final decree. An appeal from a temporary preliminary or preliminary decree may occur when the applicable decree becomes a final decree.

Ex. 2
2/3/89

IV. Senate Bill 168

This bill adds a subsection to section 85-2-234, MCA. Currently, the adjudication laws do not state that the water courts can correct clerical mistakes (e.g., misspelled names) in final decrees. Explicit authority for the court to correct clerical mistakes will eliminate any uncertainty about the legality of making these changes.

SENATE AGRICULTURE
EXHIBIT NO. 3
DATE 2/3/89
BILL NO. SB 167
SB 169

Proposed Amendments to SB 167 and SB 169
Senator Bengtson
Senate Agriculture Committee
February 3, 1989

SB 167

1. Page 3, lines 6 and 7
   Following: "within" on line 6
   Strike: the remainder of lines 6 and 7
   Insert: "the original 180 day period or any extension of it"

SB 169

1. Page 6, lines 22 and 23
   Following: "made"
   Strike: the remainder of lines 22 and 23
   Insert: "prior to the expiration of the original 180 period or any extension of it"

MONTANA STOCKGROWERS ASSOCIATION, INC.

P.O. BOX 1679 — 420 NO. CALIFORNIA ST. — PHONE (406) 442-3420 — HELENA, MONTANA 59624

SENATE AGRICULTURE
EXHIBIT NO. 4
DATE 2/7/89
BILL NO. SB169

OFFICERS:

WM. J. BROWN, JR.	SAND SPRINGS	PRESIDENT
JAMES COURTNEY	ALZADA	FIRST VICE PRESIDENT
EDWARD J. LORD	PHILIPSBURG	SECOND VICE PRESIDENT
JEROME W. JACK	HELENA	EXECUTIVE VICE PRESIDENT
KIM ENKERUD	HELENA	NATURAL RESOURCES COORDINATOR

EXECUTIVE COMMITTEE:

CLARENCE BLUNT	REGINA	WM. T. HARRER	FORT BENTON
BILL CHRISTENSEN	HOT SPRINGS	KNUD HEIREIM	TINSDALE
LYNN CORNWELL	GLASGOW	EARL LINDGREN	JOLIET
M.E. EDDLEMAN	WORDEN	ROLAND MOSHER	AUGUSTA
NANCY ESPY	BOYES	GREG RICE	HARRISON

February 3, 1989

Mr. Chairman and Members of the Senate Agriculture Committee

My name is Carol Mosher and today I am representing the Montana Stockgrowers Association, the Montana CattleWomen and the Montana Association of State Grazing Districts.

We support Senate Bill 169. There has been a question if the water court had this power and this bill codifies that power.

Thank you for this opportunity to testify in behalf of this bill.

Carol Mosher

EXHIBIT # 9
2/3/89

Ed Steinmetz
Montana Water Coun

SB169 Provides for Temp. Prelim. Decrees

COMMENTS

(1) Sec. 1, Subsection (5) should be amended: "T.P. decree shall address all claims in basin which are based upon laws of the State of MT." This is consistent with past T.P. decrees and WRCER adopted by MT Supreme Court.

(2) Sec. 1, Subsection (6) - Prelim. decree shall incorporate T.P. as modified by WT CT after objection and hearings.

(3) Sec. 3, Subsection (1)(b) This objection provision would improperly restrict objections. Better to prohibit where "noticed opportunity to participate" have been given.

(4) Sec. 3, Subsection (4). Is there a need to incorporate Notice of Intent to appear provisions?

(5) Section 6 - Applicability. Should this be made retroactive? Problem is lengthened objection periods

BEST COPY AVAILABLE

DATE 2/3/89 1 of 3

COMMITTEE ON Agriculture

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One Support	Oppc
Kim Enkeard, Cattle Mkt	MT Stockgrowers		168	
Jerry Jack	State Grain Dept of Agriculture		169	
Board Member	Pit Seattle Dinner		166 169	
Steve Frank	Farm Bureau			
Norman Cooper	U. of M.		168 169	
Pete Rice	MT Board Vet Med	111	Support	
Ronald L. Kramis	Department of Commerce	111	"	
Steve Shie	Sen Co			
Paul T. McIntyre	MWPA			
Jo Crum	Joint Board Control		166 168 169	16
J Brenna	MWPA			

23

DATE 2/3/89 2 of

COMMITTEE ON Agriculture

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Opp
Ed Steinmetz	Montana Water Court	166, 167 168, 169		
Marcia Rundle	MT Reserved Water Rights Co. Com			
Deborah B. Schmidt	EQC - Water Policy Ctt	166, 167 168, 169		
Jack Koopal	Water Policy Committee	" "		

(Please leave prepared statement with Secretary)

BEST COPY AVAILABLE

DATE 2/3/89 3 of 3

COMMITTEE ON [illegible]

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One	
			Support	Oppo
R. H. Ellis	Mt Water Res. Assn	166 167 ~~168~~-169	166 169 X 169	16 X
Lorna Frank	Mt. Farm Bureau	169-167 168-166	X	
[illegible]	[illegible]	[illegible]		

(Please leave prepared statement with Secretary)

MINUTES

MONTANA SENATE
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON AGRICULTURE

Call to Order: By Chairman Tom Beck, on February 13, 1989, at 1:00 p.m.

ROLL CALL

Members Present: Senators: Hubert Abrams, Gary Aklestad, Esther Bengtson, Gerry Devlin, Jack Galt, Greg Jergeson, Gene Thayer, Bob Williams, Chairman Beck.

Members Excused: None

Members Absent: None

Staff Present: Doug Sternberg, Legislative Council

Announcements/Discussion: None

DISPOSITION OF SENATE BILL 166

Discussion:

Senator Aklestad said he had a concern about adjudicated rights and is not convinced about the waste water provision in the bill. He mentioned that there were a couple irrigation projects where they do have extra water and they call it waste.

Senator Aklestad said he was not sure if there were different definitions of waste. He pointed out that the Muddy Creek coming off the Fairfield bench water would be waste. Senator Galt pointed out that waste was described as the unreasonable loss of water through the design and operation of any application of water through anything but a beneficial use.

Senator Aklestad pointed out another concern in the manner in which you can go in and readjudicate adjudicated water rights. It seems as though you could run through a preliminary decree or temporary preliminary decree. The water rights are nailed down now, have gone through the court systems, and now one more option is given to reopen that up. Chairman Beck pointed out that SB 76 opened up adjudicated rights.

Recommendation and Vote: Senator Galt moved that SB 166 DO PASS AS AMENDED. The motion passed with Senator Aklestad voting no.

DISPOSITION OF SENATE BILL 167

Discussion: A suggestion of a technical amendment to SB 167 and SB 169 made by Mr. Ross from the Denver consultants appears on the first page that accompanies the amendments to SB 167. These amendments were not included in the grey bill draft. If these provisions are to be included in the bill, the committee will need to act on them.

Amendments and Votes: Senator Galt moved the amendments. The question was called. The motion passed unanimously.

Recommendation and Vote: Chairman Beck said that SB 167 now had the technical amendments. A motion was made to move the bill as amended. Senator Jergeson said he was concerned that this bill provided for the reopening of streams that had final decree. He asked, "How many years could these be reopened?" He pointed out that these water bills could end up in conference committee in order to review them. It was pointed out that it was not sure that everyone had their day in court. If the final decree, came out and someone in another basin never had a chance to speak up but was affected by that final decree then they would have a chance to protest and have a day in court.

Senator Aklestad said that he had more opponents on the bill than proponents and wanted to know if the concerns of the Water Association, the Stockgrowers, and Ed Steinmetz had been taken care of. Chairman Beck pointed out that their concerns were the same as the Water Court, the DNRC, and the Water Compact. Mr. Steinmetz commented that the concerns were addressed.

Senator Galt moved that SB 167 DO PASS AS AMENDED. The motion carried unanimously.

DISPOSITION OF SENATE BILL 169

Doug Sternberg said that the Ross amendment, which was another technical amendment, needed to be acted on.

Amendments and Votes: Senator Galt moved to pass the technical amendments. The motion passed unanimously.

Recommendation and Vote: Chairman Beck said that SB 169 with the technical amendments and the amendments discussed last Friday were before the committee. Senator Galt moved that SB 169 DO PASS AS AMENDED. The motion passed unanimously.

HEARING ON SENATE BILL 387

Presentation and Opening Statement by Sponsor: Senator Gene Thayer, District 19 Great Falls, introduced SB 387. He explained the bill as an effort to give the department the tools to work with to help the situation where one grain company is purchasing warehouse receipts and maybe buying that grain from another elevator. Under federal law you are required to deliver the exact grain, and that calls for a warehouse receipt. The practical matter is that seldom ever happens and it is usually impossible to do that. Warehouses are storing a quantity of grain and do not necessarily add the exact grain in. Normally the person buying the grain works that out with the shipping elevator and they work out an agreement by a contract. This bill would allow the flexibility of loading on a different type of grain. He pointed out that there is nothing in the law that describes weights and proteins. The only thing the department of Agriculture can do at the present time is to have a hearing. The Department wishes to resolve those types of differences.

List of Testifying Proponents and What Group They Represent:

Ralph Peck, Montana Department of Agriculture
Dan Place, Broadwater Grain, Townsend, Montana

List of Testifying Opponents and What Group They Represent:

None

Testimony:
Proponents:

Ralph Peck stated that the department had been working with Senator Thayer on the bill and the U.S. Inspection Service concerning a class A and a class X and Y wheat. He stated that it is not a U.S.D.A. classification. He submitted amendments (Exhibit 4). He said that these amendments would be in line with USDA classification. He explained that a class X is an official weighing of a grain lot, a truck, or a hopper car by an official authorized weigher licenced by the U.S. Grain

ROLL CALL

AGRICULTURE COMMITTEE

DATE 2/13

51st LEGISLATIVE SESSION 1989

NAME	PRESENT	ABSENT	EXCUSED
SENATOR HUBERT ABRAMS	✓		
SENATOR GARY AKLESTAD	✓		
SENATOR ESTHER BENGTSON	✓		
SENATOR GERRY DEVLIN	✓		
SENATOR JACK GALT	✓		
SENATOR GREG JERGESON	✓		
SENATOR GENE THAYER	✓		
SENATOR BOB WILLIAMS	✓		
SENATOR TOM BECK	✓		

Each day attach to minutes.

SENATE STANDING COMMITTEE REPORT

February 14, 1989

MR. PRESIDENT:

We, your committee on Agriculture, Livestock, and Irrigation, having had under consideration SB 169 (first reading copy -- white), respectfully report that SB 169 be amended and as so amended do pass:

1. Title, line 12.
Following: "85-2-233"
Insert: "AND 85-2-235"

2. Page 1, line 18.
Following: "decree."
Insert: "(1) A water judge may issue a temporary preliminary decree prior to the issuance of a preliminary decree if the temporary preliminary decree is necessary for the orderly adjudication or administration of water rights."
Renumber: subsequent subsections

3. Page 2, line 9.
Strike: "(5)"
Insert: "(1)"

4. Page 3, lines 10 through 16.
Strike: subsection (5) in its entirety

5. Page 3, lines 18 and 19.
Following: "shall"
Strike: "use the temporary preliminary decree issued under subsection (5)."
Insert: "incorporate the temporary preliminary decree for the basin as modified by objections and hearings. [The temporary preliminary decree or preliminary decree, as modified after objections and hearings, is conclusive, enforceable, and administrable according to its terms among parties ordered yb the water judge under 85-2-406.]"

6. Page 3, lines 19 and 20.
Following: "decree,"
Strike: "when issued"
Insert: "as modified after objections and hearings"

7. Page 3, line 20.
Following: "shall"
Insert: "upon issuance"

8. Page 4, lines 1, 5, 8, 16, and 17.
Strike: "subbasin"
Insert: "basin"

9. Page 5, lines 3 and 4.
Strike: "temporary preliminary decree or"

10. Page 5, lines 6 and 7.
Following: "which"
Strike: "in total"

11. Page 5, lines 7 and 8.
Following: "divisions"
Strike: "in the general stream basin"

12. Page 5, line 8.
Strike: "subbasin"
Insert: "basin"
Following: "located."
Insert: "This notice must be provided before the final decree for the basin is issued."

13. Page 5, line 24.
Strike: "subbasin"
Insert: "basin"

14. Page 6, line 2.
Strike: "subbasins"
Insert: "basins"

15. Page 6, lines 4 and 6.
Strike: "subbasin"
Insert: "basin"

16. Page 6, lines 7 through 15.
Following: "(b)" on line 7
Strike: the remainder of line 7 through line 15
Insert: "A person does not waive the right to object to a preliminary decree by failing to object to a temporary preliminary decree. However, a person may not raise an objection to a matter in a preliminary decree if he was a party to the matter previously litigated and resolved as the result of an objection raised in a temporary preliminary decree.

continued

[(c) A person who has received notice of the availability of a temporary preliminary decree waives the right to object to the enforcement of the temporary preliminary decree under 85-2-406 if he failed to object to a temporary preliminary decree.]"

17. Page 6, lines 22 and 23.
Following: "made" on line 22
Strike: the remainder of line 22 through "decree" on line 23
Insert: "prior to expiration of the original 180-day period or any extension of it"

18. Page 8, line 10.
Following: line 9
Insert:
"Section 4. Section 85-2-235, MCA, is amended to read:
"85-2-235. **Appeals from final decree.** A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:
(1) he requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree; or
(2) his rights or priorities as determined in the temporary preliminary decree or the preliminary decree were ~~altered~~ affected as the result of ~~a hearing requested~~ an objection filed by another person."

NEW SECTION. Section 5. Coordination instruction. If Senate Bill No. 166 [LC 684] is not passed and approved, the bracketed language in [section 1 of this act] is void."
Renumber: subsequent sections

19. Page 8, line 20.
Strike: ", __Bill No.__ [LC 685],"

20. Page 8, lines 23 and 24.
Following: "[LC 684]" on line 23
Strike: ", __Bill No.__ [LC 685],"

AND AS AMENDED DO PASS

Signed: Thomas A. Beck
Thomas A. Beck, Chairman

Y. C
2/14/

EXHIBIT NO. 3
DATE 2/13/89
BILL NO. SB169

Amendments to Senate Bill No. 169
Introduced Reading Copy

For the Committee on Senate Agriculture

Prepared by Ross/Sternberg
February 11, 1989

1. Page 6, lines 22 and 23.
Following: "made" on line 22
Strike: the remainder of line 22 through "decree" on line 23
Insert: "prior to expiration of the original 180-day period or any extension of it"

Ex. # 3
2/13/89
SB 169

Amendments to Senate Bill No. 169
Introduced Reading Copy

For the Committee on Senate Agriculture

Prepared by Doug Sternberg, Committee Staff
February 11, 1989

1. Title, line 12.
Following: "85-2-233"
Insert: "and 85-2-235"

2. Page 1, line 18.
Following: "decree."
Insert: "(1) A water judge may issue a temporary preliminary decree prior to the issuance of a preliminary decree if the temporary preliminary decree is necessary for the orderly adjudication or administration of water rights."
Renumber: subsequent subsections

3. Page 2, line 9.
Strike: "(5)"
Insert: "(1)"

4. Page 3, lines 10 through 16.
Strike: subsection (5) in its entirety

5. Page 3, lines 18 and 19.
Following: "shall"
Strike: "use the temporary preliminary decree issued under subsection (5)."
Insert: "incorporate the temporary preliminary decree for the basin as modified by objections and hearings. [The temporary preliminary decree or preliminary decree, as modified after objections and hearings, is conclusive, enforceable, and administrable according to its terms among parties ordered by the water judge under 85-2-406.]"

6. Page 3, lines 19 and 20.
Following: "decree,"
Strike: "when issued"
Insert: "as modified after objections and hearings"

7. Page 3, line 20.
Following: "shall"
Insert: "upon issuance"

8. Page 4, lines 1, 5, 8, 16, and 17.
Strike: "subbasin"
Insert: "basin"

9. Page 5, lines 3 and 4.
Strike: "temporary preliminary decree or"

10. Page 5, lines 6 and 7.

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SB 169

Following: "which"
Strike: "in total"

11. Page 5, lines 7 and 8.
Following: "divisions"
Strike: "in the general stream basin"

12. Page 5, line 8.
Strike: "subbasin"
Insert: "basin"
Following: "located."
Insert: "This notice must be provided before the final decree for the basin is issued."

13. Page 5, line 24.
Strike: "subbasin"
Insert: "basin"

14. Page 6, line 2.
Strike: "subbasins"
Insert: "basins"

15. Page 6, lines 4 and 6.
Strike: "subbasin"
Insert: "basin"

16. Page 6, lines 7 through 15.
Following: "(b)" on line 7
Strike: the remainder of line 7 through line 15
Insert: "A person does not waive the right to object to a preliminary decree by failing to object to a temporary preliminary decree. However, a person may not raise an objection to a matter in a preliminary decree if he was a party to the matter previously litigated and resolved as the result of an objection raised in a temporary preliminary decree.

[(c) A person who has received notice of the availability of a temporary preliminary decree waives the right to object to the enforcement of the temporary preliminary decree under 85-2-406 if he failed to object to a temporary preliminary decree.]"

17. Page 8, line 10.
Following: line 9
Insert:

"Section 4. Section 85-2-235, MCA, is amended to read:

"85-2-235. Appeals from final decree. A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:

(1) he requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree; or

(2) his rights or priorities as determined in the temporary preliminary decree or the preliminary decree were ~~altered~~

Ex. #3
2/13/89
SB 169

affected as the result of ~~a hearing requested~~ an objection filed by another person."

NEW SECTION. Section 5. Coordination instruction. If Senate Bill No. 166 [LC 684] is not passed and approved, the bracketed language in [section 1 of this act] is void."
Renumber: subsequent sections

18. Page 8, line 20.
Strike: ", __Bill No.__ [LC 685],"

19. Page 8, lines 23 and 24.
Following: "[LC 684]" on line 24
Strike: ", __Bill No.__ [LC 685],"

SENATE BILL NO. 169

INTRODUCED BY BENGTSON, GALT, STORY, STIMATZ, SPAETH, MARKS, BRADLEY, IVERSON

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A WATER JUDGE MAY ISSUE A TEMPORARY PRELIMINARY DECREE ~~IN THOSE BASINS IN WHICH ADJUDICATION OF CLAIMS FOR FEDERAL OR INDIAN WATER RIGHTS IS PRECLUDED BY THE SUSPENSION OF ADJUDICATION UNDER 85-2-217~~ IF THE DECREE IS NECESSARY FOR THE ORDERLY ADJUDICATION OR ADMINISTRATION OF WATER RIGHTS; PROVIDING FOR OBJECTIONS AND HEARINGS ON TEMPORARY PRELIMINARY DECREES; INCREASING THE TIME LIMIT FOR REQUESTING A HEARING ON A TEMPORARY PRELIMINARY DECREE OR A PRELIMINARY DECREE; AMENDING SECTIONS 85-2-231 THROUGH 85-2-233 AND 85-2-235, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-231, MCA, is amended to read:

"85-2-231. ~~Preliminary~~ Temporary preliminary and preliminary decree. (1) A WATER JUDGE MAY ISSUE A TEMPORARY PRELIMINARY DECREE PRIOR TO THE ISSUANCE OF A PRELIMINARY DECREE IF THE TEMPORARY PRELIMINARY DECREE IS NECESSARY FOR THE ORDERLY ADJUDICATION OR ADMINISTRATION OF WATER RIGHTS.

~~(1)~~(2) (a) The water judge shall issue a preliminary decree. The preliminary decree shall be based on:

~~(a)~~(i) the statements of claim before the water judge;

~~(b)~~(ii) the data submitted by the department;

~~(c)~~(iii) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and

~~(d)~~(iv) any additional data obtained by the water judge.

(b) The preliminary decree shall be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon thereafter as is reasonably feasible.

(c) This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree, pursuant to 85-2-321 or as provided in subsection ~~(5)~~ (1) of this section, or if such a decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree.

~~(2)~~(3) A preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply of water, at a time different from the issuance of other preliminary decrees or portions of the same decree.

~~(3)~~(4) The preliminary decree shall contain the

information and make the determinations, findings, and conclusions required for the final decree under 85-2-234. The water judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency.

~~(4)~~(5) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree set forth in subsections (1) and (3)~~,~~ and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree.

~~(5)--In--a--basin--in--which-adjudication-of-claims-for federal--or--Indian--water--rights--is--precluded---by---the suspension--of--adjudication-under-85-2-217,-the-water-judge may-issue-a-temporary-preliminary-decree-in-accordance--with the--requirements-of-this-section.-The-temporary-preliminary decree-shall-address-all-claims-in-the--basin--except--those affected-by-the-suspension-required-by-85-2-217.~~

(6) In issuing a subsequent preliminary decree, the water judge shall ~~use--the--temporary--preliminary--decree issued--under--subsection--(5).~~ INCORPORATE THE TEMPORARY

PRELIMINARY DECREE FOR THE BASIN AS MODIFIED BY OBJECTIONS AND HEARINGS. [THE TEMPORARY PRELIMINARY DECREE OR PRELIMINARY DECREE, AS MODIFIED AFTER OBJECTIONS AND HEARINGS, IS CONCLUSIVE, ENFORCEABLE, AND ADMINISTRABLE ACCORDING TO ITS TERMS AMONG PARTIES ORDERED BY THE WATER JUDGE UNDER 85-2-406.] The preliminary decree, ~~when-issued~~ AS MODIFIED AFTER OBJECTIONS AND HEARINGS, shall UPON ISSUANCE supersede and replace the temporary preliminary decree."

Section 2. Section 85-2-232, MCA, is amended to read:

"**85-2-232. Availability of** temporary preliminary or **preliminary decree.** (1) The water judge shall send to the department a copy of ~~the~~ any temporary preliminary decree or preliminary decree ~~to-the-department~~ issued for a ~~subbasin~~ BASIN, and the water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to each person who has filed a claim of existing right within the decreed ~~subbasin~~ BASIN and to the purchaser under contract for deed, as defined in 70-20-115, of property in connection with which a claim of existing right has been filed within the decreed ~~subbasin~~ BASIN or, in the Powder River Basin, to each person who has filed a declaration of an existing right. The water judge shall enclose with the notice an abstract of the disposition of such person's claimed or declared existing right. The notice

of availability shall also be served upon those issued or having applied for and not having been denied a ~~beneficial water-use~~ permit to beneficially use water within the decreed ~~subbasin~~ BASIN pursuant to Title 85, chapter 2, part 3, those granted a reservation within the decreed ~~subbasin~~ BASIN pursuant to 85-2-316, or other interested persons who request service of the notice from the water judge. The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of the temporary preliminary decree or preliminary decree. Such certificate shall be conclusive evidence of due and legal notice of entry of decree.

(2) Notice of the availability of a ~~temporary preliminary--decree--or~~ preliminary decree must also be published at least once each week for 3 consecutive weeks in at least three newspapers of general circulation which ~~in total~~ cover the water division or divisions ~~in-the-general stream-basin~~ in which the decreed ~~subbasin~~ BASIN is located. THIS NOTICE MUST BE PROVIDED BEFORE THE FINAL DECREE FOR THE BASIN IS ISSUED.

~~(2)~~(3) Any person may obtain a copy of the temporary preliminary decree or preliminary decree upon payment of a

fee of $20 or the cost of printing, whichever is greater, to the water judge."

Section 3. Section 85-2-233, MCA, is amended to read:

"**85-2-233. Hearing on** temporary preliminary decree or **preliminary decree.** (1) (a) ~~Upon-objection-to-the~~ For good cause shown, a hearing shall be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by:

(i) the department~~,~~;

(ii) a person named in the temporary preliminary decree or preliminary decree~~,~~; ~~or~~

(iii) any ~~other~~ person~~,--for--good--cause--shown,-the department-or-such-person-is-entitled-to-a--hearing--thereon before--the--water-judge,~~ within the ~~subbasin~~ BASIN entitled to receive notice under 85-2-232(1); or

(iv) any other person who claims rights to the use of water from sources in other ~~subbasins~~ BASINS that are hydrologically connected to the sources within the decreed ~~subbasin~~ BASIN and who would be entitled to receive notice under 85-2-232 if his claim or claims were from sources within the decreed ~~subbasin~~ BASIN.

(b) ~~No--objection--seeking--to--reopen--and-review-any matter-previously-litigated-and-resolved-as--the--result--of any--previous--objection--process--is--allowed,--unless--the objection-is-by-an--Indian--tribe--or--federal--agency--that~~

~~commenced--negotiations--pursuant-to-85-2-702-or-85-2-703-at the-time-the-matter-was-litigated.-A-tribe-or-federal-agency that-commenced-negotiations--at--the--time--the--matter--was litigated--is--entitled--to--the--benefits-of-the-suspension provided-under-85-2-217.~~ A PERSON DOES NOT WAIVE THE RIGHT TO OBJECT TO A PRELIMINARY DECREE BY FAILING TO OBJECT TO A TEMPORARY PRELIMINARY DECREE. HOWEVER, A PERSON MAY NOT RAISE AN OBJECTION TO A MATTER IN A PRELIMINARY DECREE IF HE WAS A PARTY TO THE MATTER WHEN THE MATTER WAS PREVIOUSLY LITIGATED AND RESOLVED AS THE RESULT OF AN OBJECTION RAISED IN A TEMPORARY PRELIMINARY DECREE.

[(C) A PERSON WHO HAS RECEIVED NOTICE OF THE AVAILABILITY OF A TEMPORARY PRELIMINARY DECREE WAIVES THE RIGHT TO OBJECT TO THE ENFORCEMENT OF THE TEMPORARY PRELIMINARY DECREE UNDER 85-2-406 IF HE FAILED TO OBJECT TO A TEMPORARY PRELIMINARY DECREE.]

(2) If a hearing is requested, ~~such~~ the request must be filed with the water judge within ~~90~~ 180 days after ~~notice--of~~ entry of the temporary preliminary decree or preliminary decree. The water judge may, for good cause shown, extend this time limit ~~an~~ up to two additional ~~90 days~~ 90-day periods if application for ~~the~~ an extension is made ~~within--90--180--days--after--notice--of--entry-of-the temporary-preliminary-decree-or-preliminary-decree~~ PRIOR TO EXPIRATION OF THE ORIGINAL 180-DAY PERIOD OR ANY EXTENSION

OF IT.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the temporary preliminary decree or preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the temporary preliminary decree or preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

(5) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or 85-2-703 bars any subsequent cause of action in the water court.

(6) If the court sustains an objection to a compact, it may declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a notice of appeal shall stay the period for filing a statement of claim as required under this subsection."

SECTION 4. SECTION 85-2-235, MCA, IS AMENDED TO READ:

"**85-2-235. Appeals from final decree.** A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:

(1) he requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree; or

(2) his rights or priorities as determined in the temporary preliminary decree or the preliminary decree were ~~altered~~ affected as the result of ~~a--hearing--requested~~ an objection filed by another person."

NEW SECTION. **SECTION 5.** COORDINATION INSTRUCTION. IF SENATE BILL NO. 166 [LC 684] IS NOT PASSED AND APPROVED, THE

BRACKETED LANGUAGE IN [SECTION 1 OF THIS ACT] IS VOID.

NEW SECTION. **Section 6. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 7. Effective date.** [This act] is effective on the latest date on which any of the following occur:

(1) passage and approval of [this act], __Bill No.__ [LC 684]~~,---Bill No.---[LC 685]~~, or __Bill No.__ [LC 686]; or

(2) a final determination of failure to receive passage and approval of __Bill No.__ [LC 684]~~,---Bill No.---[LC 685]~~, or __Bill No.__ [LC 686].

NEW SECTION. **Section 8. Applicability.** [This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act].

-End-

Form CS-32
Rev. 1985

STATUS SHEET

51 LEGISLATIVE SESSION

JUDICIARY COMMITTEE

BILL NUMBER	ENTERED COM. DATE	DATE CONSIDERED	OUT OF COM.	DO PASS DATE	DO NOT PASS DATE	DO PASS AS AMENDED DATE	DO NOT PASS AS AMENDED DATE	BE CONCURRED IN DATE	BE NOT CONCURRED IN DATE	BE CONCURRED IN AMENDED DATE	BE NOT CONCURRED IN AS AMENDED DATE
SB 166	2-28	3-20	3-20							3-20	
SB 167	2-28	3-20	3-20							3-20	
SB 168	2-28	3-20	3-20					3-20			
SB 169	2-28	3-20	3-20							3-20	
SB 433	2-28	3-22	3-22					3-22			
SB 442	2-28	3-22	3-22					3-22			
SB 452	2-28	3-22	3-22					3-22			
SB 396	3-4	3-22	TABLED	ON 3-23							
SB 397	3-4	3-22	TABLED	ON 3-23							
SB 431	3-13	3-23	4-6							4-6	
SJR 23	4-20	4-20	4-20					4-20			

Use a separate sheet for Senate Bills, House Bills, and Resolutions.

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
51st LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dave Brown, on March 20, 1989, at 8:10 a.m.

ROLL CALL

Members Present: All members were present with the following exception:

Members Excused: Rep. Kelly Addy

Members Absent: None.

Staff Present: Julie Emge, Secretary
John MacMaster, Legislative Council

Announcements/Discussion: None.

HEARING ON SENATE BILLS 166, 167, 168, 169

Presentation and Opening Statement by Sponsor:

Sen. Esther Bengtson, Senate District 49 presented an exhibit that explained how the adjudication process began and that these bills are being introduced to clarify the adjudication process in Montana (EXHIBIT 1).

Sen. Bengtson presented exhibits for SB's 166, 167, 168, and 169 (See EXHIBITS 2, 3, 4, and 5).

Testifying Proponents and Who They Represent:

Jack Ross, Water Quality Committee
Jo Bruner, Executive Secretary, Montana Water Resources Assoc.
Ted Downey, Attorney Specializing in Water Law

Proponent Testimony:

Jack Ross stated that Montana has a very fine adjudication system. He said that he found that the statute did not have, as many of the states in the west do, a specific provision for the correction of clerical errors and decree. When they look at the need to adjudicate over 200,000 water rights in a time frame that is greatly collapsed by any other standards in the west, they have to recognize the possibility of such errors occurring and it is appropriate to provide mechanism for fixing those. The water courts had followed a practice where it was necessary for

administrative purposes to issue temporary preliminary decrees, before they were in position to enter what were provided in the statute for preliminary decrees. Another problem was that under existing law only final decrees can be administered. He proposed two amendments for SB 166 and SB 169 (EXHIBITS 6 and 7).

Jo Bruner stated that the Montana Water Resources Association supports these bills as they came out of the Senate.

Ted Downey stated he supports the amendments that have been generated by the Water Policy Committee. Many concerns that they had on the bills is SB 169 appears that the water court finds good cause to hold a hearing on every objection to a water right claim. Under the current law the statute says that the department can object to a water right claim or any person who is named in a decree can object to a claim and get a hearing without the water court finding good cause for that objection. Good cause is required to have a hearing by any other person who files objections that was not named in the decree.

Testifying Opponents and Who They Represent:

Richard Aldrich, Field Consultant, Department of Interior

Opponent Testimony:

Richard Aldrich stated that the function of SB 169 is that it gives the authority to the water courts for the issuance of preliminary decrees and it also defines how they may be used and administered. It provides for notice in the basin and provides for specific notice, prospectively by publication to water right holders outside a basin within a water shed. This provides for them an opportunity to appear an object to matters that may be determined in those decrees. Mr. Aldrich presented proposed amendments to SB 169 (EXHIBIT 8).

Questions From Committee Members: Rep. Brown asked Mr. Ross what he thought about the amendments. Mr. Ross stated that the question that Mr. Downey proposed dealt with a necessity for a good cause to be shown in order to object. He said he agreed that it is correct with respect to the original statute that the rights of the department people be named and the temporary preliminary decree to object did not require a showing of good cause. The distinction was made for other persons who may want to appear would have to show they had good cause for such an objection.

Rep. Brown asked Ed Steinmetz, Water Master for the Water Court, with the failure of his testimony for these bills does this mean he is neutral. Mr. Steinmetz stated that he didn't take a position because the Water Court is basically neutral and recognized its position as a court. They have worked in

there are still some concerns that do exist.

Rep. Brown questioned Mr. Aldrich if he was representing each of the five agencies as well with these statements or is this the general department divisions. Mr. Aldrich stated it is the departments position and the agencies as well.

Rep. Brown asked Mr. Aldrich if he had seen Mr. Ross' amendment that proposes to strike subsection C on SB 169. Mr. Aldrich stated that he has seen the amendments and said that his concern is more fundamental than simply with subsection C. It goes to the very process and the effect of the two track adjudication.

Rep. Brown commented to Mr. Aldrich that ten years ago when they set up the water adjudication process in Montana, they created a two track system at the federal governments request. Is he saying that he doesn't like the system the way it was done? Mr. Aldrich responded that what they are objecting to is the temporary decree process which they are proposing to codify, which was something invented by the court so that he court could move forward in areas where the adjudication they thought was going to be suspended. It was their impression that the adjudication would be completely suspended with respect to all parties in basins where they were negotiating entities particularly to the Indian tribes. The Water Court then invented the TPD process to allow the Water Court to issue decrees involving only the state appropriative claims in basins where there are reserved rights which are being negotiated.

Rep. Hannah asked Mr. Aldrich what would happen if they didn't pass the law. Would it improve their position with the department on the current practices of the court? Mr. Aldrich replied that they believe that if they don't pass the law it should send a message to the court that this is perhaps an authorized procedure. The court has been relying on the statute that allows them to enter other temporary decrees for the purposes of administration or for other purposes.

Rep. Brooke asked Mr. Ross if he could give an example of the procedures that he is referring to on page 4, lines 1-10. Mr. Ross stated that until a decree is issued for a claim, the claim constitutes prima facia evidence of the elements of a water right the person has claimed. In those basins where the adjudication has not reached the level of a temporary preliminary decree or preliminary decree, and under this provision would allow administration, then the District Court to consider the claim stated as prima facia evidence of the right in its determination of how administration would go forward. As soon as the Water Court has entered a temporary decree or a preliminary decree the material determined in the claim is no longer prima facia evidence for administrative purposes. Then they would move

to the decretal provision to determine how the administration will proceed.

Rep. Brown questioned Mr. Steinmetz if he would address Mr. Downey's concern on the good cause showing on page 6 in SB 169 and how does the court presently interpret that. Mr. Steinmetz stated that he wasn't aware of Mr. Downey's proposed amendment, but it is his impression that the way the court has read the statute and has interpreted it to this point, good cause is required for each of those entities for the department, anyone named in the decree, or for any other person. They construe good cause for the department to be very broad, they don't just require them to have a personal interest in the matter. The danger in taking out good cause requirement for people named in the decree is if there isn't good cause it gives them a reason to dismiss a harassing or spite objection.

Rep. Brown asked Mr. Downey if he would agree that the decision in this area is pretty much a policy decision on how it should apply. It is a question of whether the committee thinks it should apply across the board or be limited in the fashion that he would like. Mr. Downey commented that if the Water Court had been interpreting it the way they have, it appears it is working out satisfactorily, but the people aren't aware of that interpretation.

Closing by Sponsor: Sen. Bengtson stated that they must proceed. They feel that they have addressed the concerns of the federal government. The amendments, which address the federal government, were drafted by people from the Dept. of Natural Resources and from the Compact Commission that deals with the water rights. She commented that she doesn't feel they need anymore amendments.

DISPOSITION OF SENATE BILL 166

Motion: Rep. Stickney moved SB 166 BE CONCURRED IN, motion seconded by Rep. Nelson.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Eudaily moved SB 166 be amended as follows:

Page 7, line 15
Following: "DECREE"
Insert: ", or a person exercising a suspension under 85-2-217 and part of 7 of this chapter,"

Page 7, lines 16 through 18
Strike: "IF HE" on line 16 through "DECREE" on line 18

The amendments were seconded by Rep. Nelson and CARRIED unanimously.

Recommendation and Vote: Rep. Darko moved SB 166 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Nelson. Motion CARRIED with Rep. Boharski voting against the motion.

DISPOSITION OF SENATE BILL 167

Motion: Rep. Wyatt moved SB 167 BE CONCURRED IN, motion seconded by Rep. Darko.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Mercer moved the bill be amended as follows:

Page 2, lines 15 through 18
Strike: "A PERSON" on line 15 through the end of line 18

The amendment was seconded by Rep. Eudaily and CARRIED with Rep.'s Daily, Darko, Wyatt, Strizich, Brown, and McDonough voting Nay.

Recommendation and Vote: Rep. Knapp moved SB 167 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Stickney. Motion CARRIED with Rep. Daily voting against the motion.

DISPOSITION OF SENATE BILL 168

Motion: Rep. Nelson moved SB 168 BE CONCURRED IN. Rep. Wyatt seconded the motion.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: Question was called for on the motion and CARRIED unanimously.

DISPOSITION OF SENATE BILL 169

Motion: Rep. Wyatt moved SB 169 BE CONCURRED IN. Rep. Nelson seconded the motion.

Discussion: None.

Amendments, Discussion, and Votes: Rep. Wyatt moved SB 169 be amended as follows:

Page 7, lines 7-16
Strike: subsection (c) in its entirety

The amendment was seconded by Rep. Brooke and CARRIED.

Rep. Mercer moved to amend as follows:

Page 7, lines 7-11
Strike: "HOWEVER," ON LINE 7 through the end of line 11.

The amendment was seconded by Rep. Boharski and CARRIED unanimously.

Rep. Mercer stated that they are getting into a situation where people are going to have to make a choice. There isn't any reason why someone should be giving up their rights to raise some further objections which would only be aimed at furthering the accuracy of the determination of the water rights. If there are some other rules dealing with race adjudicate out there then there shouldn't be any reason why they should just apply in their normal sense. Mr. Ross stated that to understand the concept of this piece of legislation they have to keep in mind that this is a judicial proceeding. The reason for saying they shouldn't have a right to take two bites out of the same cherry is just the same as any law suit he (Rep. Mercer) is faced with. He prepares his case on the best information he has. It is a contested matter he shouldn't be subjected to a second time to the same issue being tried by the same parties, and that is the principle reason why the provision is in the bill. It is simply to say if they have a matter which they litigate fairly and as honestly as they can then the claim should not be subjected a second time to somebody litigating the same issue.

Rep. Brown stated that line 7-11 states that they can have a trial and then appeal it. By removing that they are put under the situation whey they can have two trials on the same matter. He opposes the matter.

Rep. Brooke asked Mr. Steinmetz if in the preliminary decree stage, could some objector who had only used the temporary preliminary decree stage to object, could that preliminary decree then affect his right that was determined during the temporary preliminary decree. Mr. Steinmetz stated that if further objections are filed against that particular right, unless an objection is filed, the right can go all they way through the process to final decree without amendment.

Rep. Boharski asked Mr. Steinmetz what the process is if someone doesn't agree with the temporary preliminary decree and they want to object. Can they go directly from there to the District Court? Mr. Steinmetz stated that the whole process takes place before the Water Court. Basically the person would file an objection to the particular water rights

A vote was taken on Rep. Mercer's amendment and CARRIED with Rep.'s Wyatt, McDonough, Darko, and Brown voting against the amendment.

Recommendation and Vote: Rep. Boharski moved SB 169 BE CONCURRED IN AS AMENDED, motion seconded by Rep. Darko. Motion CARRIED with a unanimous vote.

DISPOSITION OF SENATE BILL 347

Motion: Rep. Strizich moved SB 347 be TABLED, motion seconded by Rep. Rice.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: A vote was taken on the motion to TABLE SB 347 and CARRIED unanimously.

DISPOSITION OF SENATE BILL 353

Motion: Rep. Nelson moved SB 353 BE CONCURRED IN, motion seconded by Rep. Rice.

Discussion: None.

Amendments, Discussion, and Votes: None.

Recommendation and Vote: A vote was taken on the motion and CARRIED unanimously.

DISPOSITION OF HOUSE BILL 699

Motion: Rep. Aafedt moved HB 699 DO PASS. Rep. Stickney seconded the motion.

Discussion: Rep. McDonough reviewed with the committee the amended version of HB 699 (See Gray Bill, EXHIBIT 10).

Amendments, Discussion, and Votes: Rep. McDonough moved the amendments proposed by the subcommittee, motion seconded by Rep. Addy.

Rep. Wyatt stated that this situation is most advantageous for the woman and her baby, because what she is putting up front is $25 in anticipation that she has thrown away $25. If she hasn't and she has a child, that has a handicap and it is not a genetic handicap, but a handicap that is questionable as to how it was arrived in the delivery process, not at the fault of the physician. If they were to take it to the regular court system, this way her child has some potential

STANDING COMMITTEE REPORT

March 20, 1989

Mr. Speaker: We, the committee on Judiciary report that SENATE BILL 169 (third reading copy -- blue) be concurred in as amended .

Signed: Dave Brown
Dave Brown, Chairman

And, that such amendments read:

1. Page 7, lines 7 through 16.
Strike: "HOWEVER," on line 7 through end of line 16

HOUSE
SB 169

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DAILY ROLL CALL

JUDICIARY COMMITTEE

51st LEGISLATIVE SESSION -- 1989

Date March 20, 1989

NAME	PRESENT	ABSENT	EXCUSED
REP. KELLY ADDY, VICE-CHAIRMAN			X
REP. OLE AAFEDT	X		
REP. WILLIAM BOHARSKI	X		
REP. VIVIAN BROOKE	X		
REP. FRITZ DAILY	X		
REP. PAULA DARKO	X		
REP. RALPH EUDAILY	X		
REP. BUDD GOULD	X		
REP. TOM HANNAH	X		
REP. ROGER KNAPP	X		
REP. MARY McDONOUGH	X		
REP. JOHN MERCER	X		
REP. LINDA NELSON	X		
REP. JIM RICE	X		
REP. JESSICA STICKNEY	X		
REP. BILL STRIZICH	X		
REP. DIANA WYATT	X		
REP. DAVE BROWN, CHAIRMAN	X		

EXHIBIT 1
DATE 3-20-89
SB 166, 167, 168

SOME BASICS CONCERNING THE WATER RIGHTS ADJUDICATION PROCESS

March 1989

1. The Montana Water Courts are organized into four divisions:

   - the Upper Missouri River Basin (Chief Judge W.W. Lessley);
   - the Lower Missouri River Basin (Judge Bernard W. Thomas);
   - the Clark Fork River Basin (Judge Leif Erickson); and
   - the Yellowstone River Basin (Judge Roy C. Rodeghiero).

2. The current adjudication laws went into effect with the passage of Senate Bill 76 in 1979. The deadline for filing claims of existing (pre-July 1, 1973) rights was April 30, 1982. Over 203,000 claims were filed.

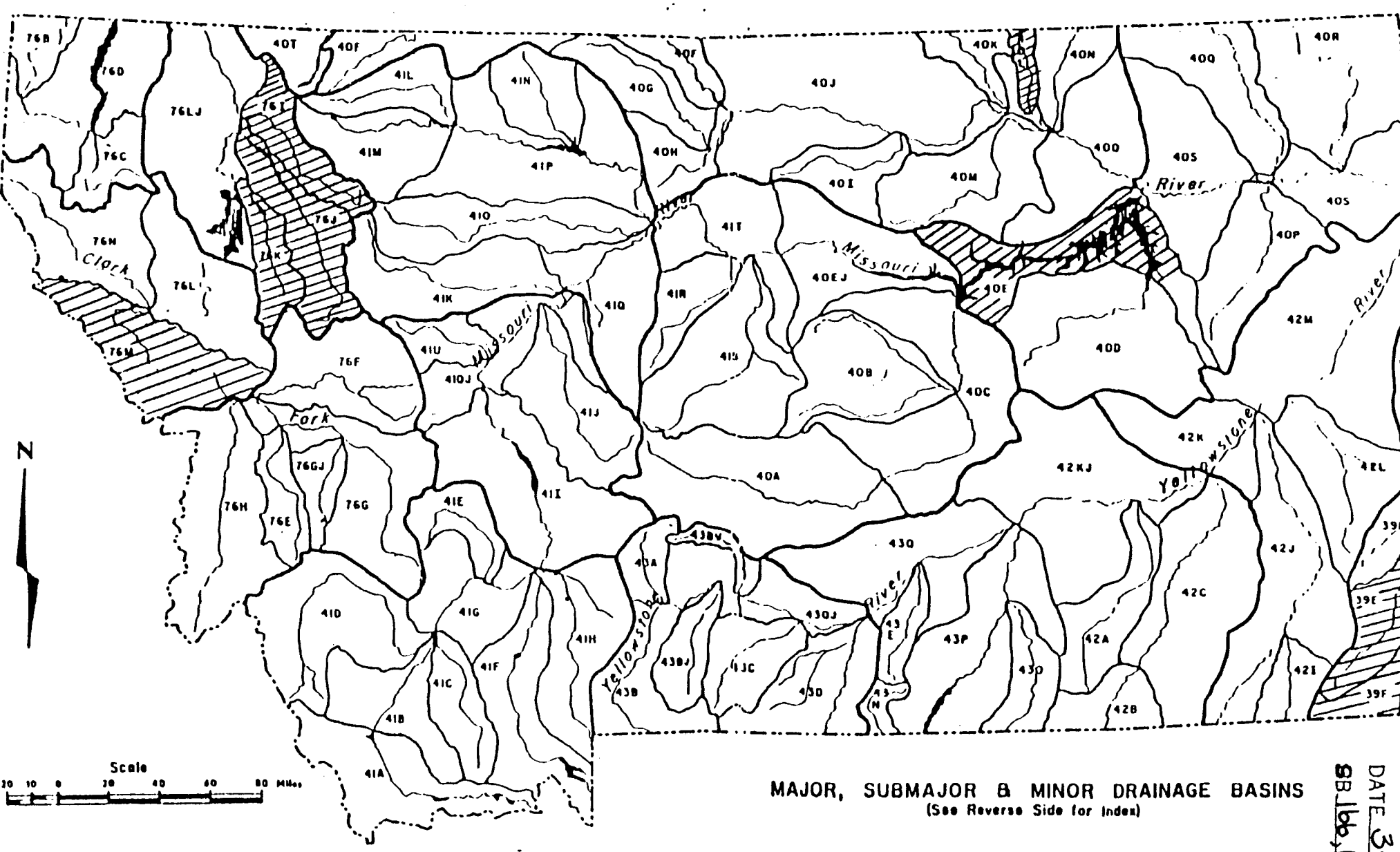
3. Since 1982, the Water Courts have been reviewing the claims and issuing decrees in various subbasins. There are 85 subbasins in Montana.

4. The Water Courts issue three types of decrees. A temporary preliminary decree is issued for non-federal and Indian claims in any basin where the federal and Indian claims remain unresolved because of negotiations with the Reserved Water Rights Compact Commission. A preliminary decree is issued when all claims (state-based and federal and Indian claims) are before the court. Senate Bill 169 ensures that both of these decrees are subject to extensive notice and opportunity for objections and hearings.

Finally, after considering all objections and the evidence before it, the Water Court issues a final decree.

5. The Department of Natural Resources and Conservation is required to assist the Water Courts. The DNRC's functions include maintaining the data base and examining claims for accuracy. Claim examination normally involves in-house review, including air photo interpretation, but can at times involve examination by field office staff at the site of the claim.

6. With funding from a special appropriation, the Water Policy Committee hired Saunders, Snyder, Ross & Dickson, P.C., of Denver, Colorado to examine the water rights adjudication process to determine if it is legally adequate, particularly if a challenge occurred under the McCarran Amendment (which allows states to adjudicate federal and Indian claims).



DATE 3-20-89
SB 166, 167, 168 + 169

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EXHIBIT 2
DATE 3-20-89
SB 166

The Water Rights Adjudication Bills

By Request of the Water Policy Committee
Senator Esther Bengtson, sponsor
March 20, 1989

The Water Policy Committee's principal agenda item for the 1987-1989 interim was Montana's water rights adjudication process. This focus resulted from an appropriation by the 1987 Legislature to hire a consultant with no conflict of interest to review and analyze the adjudication process. The consultant's report, and the committee's final conclusions, stress that the adjudication process is working properly but that some minor legislative changes are needed to ensure that the results sought by the legislature in 1979 are achieved.

Several technical amendments are added to these bills by the Senate Agriculture Committee as a result of discussions and consensus recommendations offered by technical persons attached to the Water Policy Committee, the Water Courts, the DNRC, and the Reserved Water Rights Compact Commission.

I. Senate Bill 166

This bill enables the district courts to administer or enforce water rights according to a temporary preliminary decree or a preliminary decree, as modified after objections and hearings. Under existing law, only final decrees may be administered.

The bill also places water rights administration solely with the district courts, thereby emphasizing the water courts' principal adjudication function. The major sections of the bill are sections 2, 3, 5, 6 and 7.

Section 2

Section 3-7-211 is amended so that exclusive authority for administration of decrees lies with the district courts and not the water courts. The amendment emphasizes the role of the water courts in adjudicating existing water rights, not administering them. Water commissioners appointed by the district court have authority to distribute water according to the terms of the decree, as modified after objections and hearings.

Section 3

This section is fundamental to the bill. Note that the district court has jurisdiction and that the district court can administer not only a final decree but also temporary preliminary and preliminary decrees.

Section 5

Under existing law (85-2-227), a properly filed claim of existing right constitutes prima facie proof of its contents until a final decree is issued. This amendment modifies the prima facie status of a claim or amended claim for administration purposes only by stating that the claim is superseded by the issuance of a temporary preliminary decree or preliminary decree, as modified after objections and hearings. The change ensures that rights will be administered according to the most accurate determination available.

Section 6

This section amends 85-2-406 to describe how the district court shall resolve water distribution controversies and enforce decrees. The Senate Agriculture Committee amendments restate much of the original statute and provide for enforcement of temporary preliminary and preliminary decrees in subsection (2).

Again, the district courts supervise this process. If the matter involves an existing (pre-July 1, 1973) water right that has not been adjudicated in a final decree, the part of the controversy involving the determination of the pre-July 1, 1973 right would be referred to the water courts.

Subsection (5) provides an appeals process to persons who might be harmed by the administration of a temporary preliminary or preliminary decree. Otherwise, the person would have to wait until the final decree is issued. [Note amendments]

Section 7

The amendments allow for the appointment of a water commissioner to administer or enforce a temporary preliminary, preliminary or final decree.

Section 11

The applicability section allows a person whose rights are already determined in an existing temporary preliminary decree or preliminary decree to petition the water judge for relief concerning any matter in the decree prior to enforcement of the decree (a mini-reopening provision).

Section 12

The effective date for this bill and Senate Bills 167 and 169 is when the last bill receives final action.

EXHIBIT 3
DATE 3-20-89
SB 167

II. Senate Bill 167

Section 1 of the bill would be a new section in Title 85, chapter 2, part 2 (the adjudication laws).

Subsection 1

Subsection 1 states the general purpose of the bill. At some time the Water Courts must reopen every preliminary or final decree that has not been noticed throughout the water divisions. This ensures that persons throughout the general stream basin will have a chance to participate in the adjudication process and bolsters the probability that Montana's adjudication process will withstand any federal challenge.

Subsection 2

The limitation on who can object when a decree is reopened, as agreed to by the technical representatives mentioned earlier and adopted by the Senate Agriculture committee, is stated in subsection 2(b) of section 1:

> A person may not raise an objection to a matter in a reopened decree if he was a party to the matter when the matter was previously litigated and resolved as the result of a previous objection process.

Thus, a person is precluded from objecting to a matter in a reopened decree is reopened if he actively litigated the matter as an issue during previous objections and hearings.

Subsections 3 and 4

This section describes notice requirements for reopened decrees. Notice by mail must be sent to each person or entity with a claim, permit or reservation in the basin at issue. In addition, notice of the decree's availability must be published in at least 3 newspapers geographically distributed in the general stream basin in which the basin is located.

Subsection 5

A longer 180-day time period, with possibly two 90-day extensions, is provided for objections. This helps ensure ample opportunity for participation by affected persons.

Subsections 6, 7 and 8

Subsection 6 ensures notice to claimants of objections to their claims. Subsection 7 allows the water judge to dismiss the objection or to modify claims based on the evidence before him. Subsection 8 reinforces that appeals are allowed from a final decree. In addition, an appeal is available under SB 166 if the decree is being enforced.

III. Senate Bill 168

This bill adds a subsection to section 85-2-234, MCA. Currently, the adjudication laws do not state that the water courts can correct clerical mistakes (e.g., misspelled names) in final decrees. Explicit authority for the court to correct clerical mistakes will eliminate any uncertainty about the legality of making these changes.

The amendment added as subsection 4 ensures that the final decree will have a list of the existing rights and their relative priority in a form determined appropriate by the water judge.

IV. Senate Bill 169

Senate Bill 169 provides explicitly that the Water Courts may issue temporary preliminary decrees (a practice already occurring) and modifies the notice requirements and the objections and hearings process.

Section 1

New subsection 1 is a new version of the old subsection 5 (now stricken). The subsection states that a temporary preliminary decree may be issued by water courts as needed to allow orderly administration or adjudication of water rights.

Subsection 6 describes the relationship between the temporary preliminary decree and preliminary decree. The temporary preliminary decree must be used in issuing the preliminary decree, though the preliminary decree, after objections and hearings, supercedes the temporary preliminary decree.

Section 2

Notice of a preliminary decree must be published throughout the general stream basin prior to the issuance of a final decree.

Section 3

The objections hearings process is largely identical to the process provided for the reopening of decrees (SB 167). The limitation on who may object at the preliminary decree stage is also conceptually the same as the limit used in SB 167:

> ...a person may not raise an objection to a matter in a reopened decree if he was a party to the matter when the matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary decree.

Subsection 2 extends the time period for filing objections and requests for hearing to 180 days after notice is given of the

EXHIBIT 5
DATE 3-20-89
SB 169

decrees. Two 90-day extensions, for good cause shown, are also provided. This helps to ensure that adequate time is available for interested parties to review the decree.

The amendments in the remainder of the section simply apply existing law to temporary preliminary decrees.

Section 4

Section 4 is a new amended section providing that appeals from a final decree may be based on objections raised to or rights affected by a temporary preliminary decree.

Section 5 is a coordination instruction that would remove enforcement language if SB166 dies. [However, note the proposed amendment to strike section 3(1)(c)....page 7, lines 12-16].

EXHIBIT 7
DATE 3-20-89
SB 169

Amendments to Senate Bill No. 169
Third Reading Copy

Requested by Senator Bengtson
For the House Committee on Judiciary

March 17, 1989

SB 169
1. Page 7, lines 12 through 16.
Strike: subsection (c) in its entirety

This amendment removes a limitation on who may object to enforcement of a temporary preliminary or preliminary decree. The remaining limitation is stated in section 6 of Senate Bill 166. Subsection (2) of this section (85-2-406) states that:

> "any party to the controversy or any person whose rights are or may be affected by enforcement of [the temporary preliminary or preliminary] decree may petition the district court for relief."

6C

EXHIBIT 8
DATE 3-20-89
SB 169

HOUSE JUDICIARY COMMITTEE

Dave Brown, Chairman	Linda Nelson	Ralph Eudaly
Kelly Addy, Esq.	Jessica Stickney	Budd Gould
Vivian Brook	Bill Strivich	Tom Hannah
Fritz Dayly	Diana Wyatt	Roger Knapp
Paula Darko	Ole Aasedt	John Mercer, Esq.
Mary McDonough, Esq.	William Bohavski	Jim Rice

Mr. Chairman and Members of the House Judiciary Committee:

My name is Richard Aldrich and I am the Field Solicitor for the Department of the Interior. I am here today to present the Department's views on proposed legislation and to express concern about existing trends and practices of the Montana Water Court.

As the Field Solicitor, I am the supervising attorney for the United States Department of the Interior for Montana, Wyoming, North and South Dakota. The Department has five agencies which administer water programs in Montana: The Bureau of Land Management, Bureau of Reclamation, Bureau of Indian Affairs, National Park Service and Fish and Wildlife Service. For an additional discussion of the nature of our legal concerns regarding the proposed legislation dealing with the adjudication of water rights, please refer to the letter to Senator Galt from the Department of Justice dated February 9, 1989.

The United States has a significant stake in the Montana General Stream Adjudication. The United States has filed approximately 32,000 claims for water rights in the Montana Adjudication and has filed approximately 5000 objections to claims. In addition, the Department of the Interior has the responsibility for negotiating with the Reserved Water Rights Compact Commission directly for the reserved rights of the Park Service, Fish and Wildlife Service, the Wild and Scenic Missouri River for the Bureau of Land Management and is participating along with Tribal delegations from eight Indian reservations in negotiations. The United States Department of Agriculture has both appropriative and reserved water right claims in the Adjudication, but it has not participated in preparation of the following comments.

This committee has before it four bills proposing to amend various sections of the adjudication statute. Because this legislation directly affects the Department of Interior and its water using agencies in Montana, we have prepared comments for this hearing. My remarks today are directed towards S.B. 169, although some of the same concerns apply to the other three bills.

Exhibit # 8
3/20/89

S.B. 169 allows a water judge to issue a Temporary Preliminary Decree, if it is necessary for the orderly ADJUDICATION or administration of water rights.

The Department believes that this amendment to the Montana Adjudication Statute will lead to a piecemeal adjudication in violation of Federal Law and is inconsistent with the present adjudication statute

The success of the Montana General Steam Adjudication necessarily depends on accurate decrees of all water uses in the State. The need for adjudicating all water uses is a prerequisite for joining the United States in the litigation. Indeed, the United States is a necessary party due to the large ownership of lands and water rights by the United States in Montana. Congress has provided a limited waiver of sovereign immunity allowing the joinder of the United States, and its water rights, in water adjudications through the McCarran Amendment (43 USC 666). That Federal Statute allows the joinder of the United States in water adjudication actions that are comprehensive; i.e. all water right claimants are joined and all rights are decreed.

The Department believes that, in order to meet the comprehensiveness requirement of the McCarran Statute, the State is obligated to wait and hold its hearings and evidentiary proceedings when all claims in a particular basin can be heard at once. To wait until all claims are before the Water Court assures an adequate inter sese in rem proceeding. To proceed otherwise breaks up the adjudication into unrelated pieces. Such a piecemeal process forecloses the comprehensive nature of the Montana adjudication and imperils the States' jurisdiction under the McCarran Amendment. Thus the State will have removed the United States as a party to the Adjudication.

S.B. 169 codifies the present practice of the Water Court which has expedited the adjudication process without regard to the suspension provisions of the Adjudication statute. Thus S.B. 169 will assure that the Water Court may continue to issue decrees without the participation of or the authority to bind all water users.

The result of the existing Water Court TPD procedure is a series of decrees going from one point of least resistance to the next. The ramifications of this process are inadequate, often inaccurate and unenforceable decrees upon which local water users will mistakenly rely. The procedure being advanced today is not what this legislature envisioned ten years ago. S.B. 169 exacerbates the problem - it does not fix it.

When the legislature passed S.B. 76 in 1979, it provided for a clean judicial process that allowed the Water Court to use the Department of Natural Resources and Conservation for technical expertise. The use of DNRC complemented the legislature's

mandate to the Water Court to facilitate an expeditious adjudication of water rights. However, the legislature did not foresee two conflicts.

First, the legislature provided for the suspension of all adjudication proceedings on claims for federal and Indian reserved rights in water divisions in which there are reserved right claims subject to negotiations. That suspension precludes the routine decreeing of water basins. The Water Court began by issuing decrees not subject to negotiations but soon ran out of basins with water rights not involved in negotiation. As a solution, the Court instituted Temporary Preliminary Decrees on all the state law based rights in a basin. We believe that this bifurcation of the adjudication violates both federal and state law. By allowing state law claimants to litigate in the absence of federal law claimants, the Adjudication has degenerated into a piecemeal adjudication. The result is a perception by water users that their rights are adjudicated and the creation of a solidified wall of opposition to later adjudicated federal claims. S.B. 169 encourages this reaction by allowing an entire TPD to be conclusive, enforceable and administrable according to its terms among parties ordered by the water judge under MCA 85-2-406. There is no fairness nor due process in this TPD process.

State law is best expressed at Montana Code Annotated 85-2-701:

> "Because the water and water rights within each water division ARE INTERRELATED, it is the INTENT of the legislature to conduct UNIFIED PROCEEDINGS for the general adjudication of existing water rights under the Montana Water Use Act."

It is clear that this provision of State law does not contemplate a bifurcated proceeding, and the Department of the Interior has relied upon that intent, especially for Indian reserved water rights. S.B. 169 will change that course in mid-stream.

The drafters of the Adjudication Statute understood the time consuming nature of litigation and negotiation. In fairness, they recognized that the United States could not be required to do both. That is why they enacted MCA 85-2-217 to suspend all proceedings. If you adopt legislation requiring the United States to negotiate and litigate at the same time, you will have imposed a unique burden on the United States that is not shared by any other water right claimant. You may force the United States to seek judicial relief from this discrimination and to terminate the negotiation process. It appears as though you will have impliedly repealed the negotiation provision. We can not reconcile the suspension provision and the codification of the TPD procedure.

The second conflict not foreseen by the legislature in 1979 was the inaccuracy and inflated nature of many of the claims filed. The legislature correctly presumed that many claimants would file

their claims without legal or technical assistance. Yet the statute contemplates a quick, clean judicial process. The Water Court quickly realized that most claims were ill-prepared and incomplete. The Court took advantage of the technical assistance of the DNRC to clarify claims but then met a new problem. Once the claims were clarified by filling in all the blanks with relevant information, the Court learned that the information often was inaccurate. The Water Court's recognition of these inaccuracies and its obligation to resolve them has directly run afoul of the quick, clean judicial process and the legislature's mandate to the Water Court to expedite the adjudication. The Water Court has struggled with this issue.

We note that initially the Water Court consciously avoided basins with Indian Reserved Rights. S.B. 169 as originally filed proposed to give legislative approval to decreeing basins which contained Indian reserved right claims. That proposal was met with strong objections by persons working in the Indian negotiations. Now the amended bill allows "TPD's" where necessary for the orderly ADJUDICATION or administration of water rights. The fact is the Water Court has moved so quickly that the only basins left are ones containing federal or Indian reserved water right claims that are being negotiated under the state statute which suspended "all proceedings" until there can be a "unified proceeding." Thus S.B. 169 is as a practical matter legislative approval for decreeing basins containing Indian reserved water rights. The Department opposes the enactment of S.B. 169 for this reason among others.

I do not want to leave the impression that water users in basins containing federal or Indian reserved rights are unable to administer water use until the United States is an active party. The Montana statute provides for an exception at MCA 85-2- 231.

There may well be occasions when there is a genuine need for an interlocutory or temporary determination in a basin, pending the general adjudication of all water interests in that basin. This, however, is very different from the two-track system of adjudication which has been employed by the Water Court to date, and which will be formalized if S.B. 169 becomes law. We have already suggested to the Montana Supreme Court that the following language be added to the Water Claims Examination Rules in order to allow for interlocutory decrees in appropriate situations:

> Pursuant to M.C.A. § 85-2-231(1)(d), the Water Court may issue an interlocutory decree or other temporary decree pursuant to § 85-2-231 or if such decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. Prior to issuing such an interlocutory or other temporary decree, the Water Court shall make a determination, supported by findings of fact and conclusions of law, that such a decree is authorized by

§ 85-2-231 or is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. This determination will be upheld if supported by substantial evidence.

Please see the United States comments to the Montana Supreme Court on the Interim Claims Examination Rules.

I am sure that you will hear that the United States must not really have complaints about TPD's because they have participated in nearly every one decreed to date. That is true - we have, but we do so under protest and with a concern that the appearance of one federal agency using state law based water rights may prejudice another federal agency using reserved rights claims merely because both sets of claims legally are held by the United States. S.B. 169 may force the resolution of this conflict. Section 3 of the proposed bill discusses later objections in the Preliminary Decree process. On page 7 lines 5 through 11 the bill reads:

> A PERSON DOES NOT WAIVE THE RIGHT TO OBJECT TO A PRELIMINARY DECREE BY FAILING TO OBJECT TO A TEMPORARY PRELIMINARY DECREE. HOWEVER, A PERSON MAY NOT RAISE AN OBJECTION TO A MATTER IN A PRELIMINARY DECREE IF HE WAS A PARTY TO THE MATTER WHEN THE MATTER WAS PREVIOUSLY LITIGATED AND RESOLVED AS THE RESULT OF AN OBJECTION RAISED IN A TEMPORARY PRELIMINARY DECREE.
>
> We find this language to be vague.
>
> Who is a party?
> Is it the United States or the individual federal agencies?
> The United States is the federal party and as such it represents the interests of its various agencies.
> Is there an exemption for agencies that negotiate?
> What do you mean by "matter?"
> Does this mean an entire TPD or entire claim or parts of the water right?
> If the United States initially objects to flow rate, is the United States later foreclosed from objecting to acreage or priority date in the same claim?
> If the United States on behalf of one agency appears in a TPD, can the United States on behalf of another agency appear in the preliminary decree?

The vagueness in this provision may cause the Department to pause and seriously reconsider its participation in TPD's. We note that S.B. 167 contains the same vague language.

A good example of the basic unfairness of the current Water Court procedure, which S.B. 169 proposes to codify is Section 3(c). We note this provisions conflict with S.B.166 Section 6.

Exhibit # 8
3/20/89

(c) A PERSON WHO HAS RECEIVED NOTICE OF THE AVAILABILITY OF A TEMPORARY PRELIMINARY DECREE WAIVES THE RIGHT TO OBJECT TO THE ENFORCEMENT OF THE TEMPORARY PRELIMINARY DECREE UNDER 85-2-406 IF HE FAILED TO OBJECT TO A TEMPORARY PRELIMINARY DECREE.

Thus if the United States must forego participation in Temporary Preliminary Decrees because its agencies' staffs are negotiating and because we do not want to jeopardize our ability to scrutinize every claim, we can be precluded from objecting to the enforcement or administration of our state law based claims that were included in a TPD. We have serious concerns as to the fairness of this catch 22 provision. Also, we do not believe the State has the authority to administer United States water rights prior to a final decree.

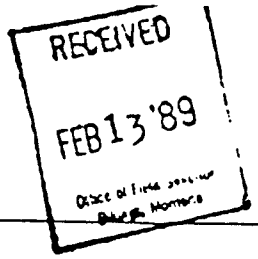
In sum, we are concerned with the effects of past and future TPDs on 1) our capacity to continue negotiations rather than resort to litigation; 2) fairness and economy of process to all litigants, but especially the United States whose claims would be decreed in a later proceeding; and 3) State court jurisdiction over the United States pursuant to the McCarran Amendment.

If this legislation is passed as presently written, the Solicitors Office will have to advise the Secretary that continued participation in TPDs could have serious consequences on the rights of the United States. The United States is one of the largest claimants and has been one of the largest objectors in the adjudication thus far. We believe it has been through the efforts of the United States through the objection process that a degree of accuracy has been maintained in the adjudication. If S.B. 169 is passed, the State will force the Department of the Interior to reevaluate the Montana Adjudication as a McCarran Amendment proceeding.

Thank You.

EXHIBIT # 6
3/20/89

U.S. Department o



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90-6-2-1

Washington, D.C. 20530

February 9, 1989

Senator Jack E. Galt
Chairman
Reserved Water Rights ~~Compact Commission~~
1520 East Sixth Avenue
Helena, Montana 59620-2301

Dear Senator Galt:

Re: Montana ~~Water Adjudication~~ — ~~Comments on~~ Proposed ~~Legislation Respecting Temporary~~ Preliminary Decrees.

This is in reference to your letter dated December 28, 1988, to the Interior Department Field Solicitor in Billings, inviting comments on proposed legislation regarding the statewide water adjudication process. We offer the comments below on behalf of the Department of Justice, which has the primary responsibility of representing the United States and its agencies in the water proceedings.

The draft bills which have been brought to our attention deal with reopening decrees of water rights, the use of temporary preliminary decrees, the administration of the latter form of decree, and correction of clerical errors in decrees. The following is not an exhaustive recitation of all of our views on these subjects. Rather, we note here matters of special concern, particularly on the subject of temporary preliminary decrees.

I. Formalized Use of Temporary Preliminary Decrees (TPD's). -- The comments under this heading relate to the draft entitled "An Act Providing Clear Authority for the Issuance of Temporary Decrees in Those Basins in Which Adjudication of Claims for Federal or Indian Water Rights Is Precluded," etc. That bill does what its title states: it expressly authorizes the issuance of TPD's in any basin in which adjudication of claims for federal or Indian reserved water rights is prevented by M.C.A. § 85-2-217, which suspends the adjudication of such water rights while they are being negotiated with the Compact Commission. The bill also states that the TPD shall address all claims in the basin except those affected by the suspension. (See proposed § 85-2-231(d)(5).)

A. TPD's Lead to a Piecemeal Adjudication. -- The Montana Water Court has been routinely entering TPD's for years. The draft bill would formally sanction that practice. We oppose this provision because, as explained below, the routine use of temporary preliminary decrees in the Montana adjudication is leading to a piecemeal adjudication of water rights, contrary to the McCarran Amendment, 43 U.S.C. § 666.

The McCarran enactment is a waiver of sovereign immunity which authorizes the joinder of the United States in a general stream adjudication. See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976). As a statute consenting to suit against the United States, any conditions which Congress has attached to that consent must be strictly observed, and exceptions thereto must not be lightly implied. Block v. North Dakota, 461 U.S. 273, 287 (1983).

The McCarran statute consents to suit against the United States on the condition that the proceedings be comprehensive, in which all water claimants are joined and all rights to the use of water are decreed. Dugan v. Rank, 372 U.S. 609, 617-619 (1963) (McCarran Amendment did not authorize suit where all claimants to water rights in San Joaquin River were not joined as parties and priorities were not to be determined among all parties). The McCarran statute was designed to avoid the adjudication of water rights in a "piecemeal" fashion. Colorado River, 424 U.S. at 819.

The utilization of TPD's to adjudicate rights based upon state law, while federal reserved rights are subject to the negotiation process of M.C.A. §§ 85-2-701 through -705, indicates that in practice Montana's water adjudication is devolving into a piecemeal adjudication, against the intent of the McCarran Amendment.

In actuality, since the initiation of the Senate Bill 76 proceedings, little progress has been made in achieving settlements of Indian and federal reserved rights.[1/] Nonetheless, the adjudication of those rights has been stayed during the pendency of formal "negotiations" between the Compact Commission and federal agencies and Indian Tribes, by virtue of § 85-2-217. In the meantime, the Water Court has been proceeding with haste to determine all state law water rights, chiefly through the device of TPD's. In effect, state law water rights and federal reserved rights are being processed under different statutory regimes, and it is an open question whether the Water Court will be able, at some time in the distant future,

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1/ The Northern Cheyenne Tribe has recently made a settlement proposal to the Compact Commission. We hope that the Commission is prepared to begin negotiations soon on this matter.

to integrate the determination of these two classes of rights into unitary final decrees. Thus, the piecemealing of the Senate Bill 76 process could have unfortunate consequences several years down the road.

The foregoing does not mean that temporary decrees should never be entered in advance of the preliminary decree authorized by M.C.A. § 85-2-231. There may well be occasions when there is a genuine need for interlocutory or temporary relief in a basin pending the general adjudication of all water interests in that basin. This, however, is very different from the two-track system which has been employed in the adjudication to date, and which will be formalized if the bill becomes law. We have already suggested to the Montana Supreme Court that the following language be added to the Water Claims Examination Rules in order to allow for interlocutory decrees in appropriate situations:

> Pursuant to M.C.A. § 85-2-231(1)(d), the Water Court may issue an interlocutory decree or other temporary decree pursuant to § 85-2-321 or if such decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. Prior to issuing such an interlocutory or other temporary decree, the Water Court shall make a determination, supported by findings of fact and conclusions of law, that such a decree is authorized by § 85-2-321 or is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree. This determination will be upheld if supported by substantial evidence.

See United States' Comments on Water Claims Examination Rules at 11, In re DNRC, No. 86-397 (Mont. Sup. Ct.). The suggested language addresses the need for an interim decree before the preliminary decree, while avoiding the routinized use of TPD's.

In addition, the proposed bill would apparently permit TPD's to be issued for basins within federal reservations, including Indian Reservations. It has been the Water Court practice to refrain from entering TPD's to cover basins within Indian reservations. For this reason, the bill would compound the problem of improper bifurcation of the Montana adjudication.

Our concern with the piecemealing of Montana's adjudication is based on more than technical considerations emanating from the McCarran Amendment. There is a real chance of unfairness to the United States and Indian Tribes if the adjudication proceeds along two paths. Water claimants whose rights are embodied in TPD's will come to regard those rights as fixed. This is especially troublesome because in our experience many of the rights included in TPD's are greatly exaggerated or

otherwise inaccurate. In the meantime, the determination of federal and Indian reserved rights is making little or no progress. By the time the Water Court turns to adjudicating the reserved rights (assuming they have not been compacted), the United States and the Tribes will be faced with a wall of opposition from claimants whose claims were included in TPD's, and who may have been relying on the TPD's for years. This result can and should be avoided by avoiding a piecemeal determination of water rights.

B. Federal Law Prohibits Requiring the United States to Pay for Costs. -- Finally, the proposed § 85-2-232(3), insofar as it is applied to the United States, violates federal law. The provision states that any person may obtain a copy of the temporary preliminary or preliminary decree upon payment of a fee.

The McCarran statute directs that "no judgment for costs shall be entered against the United States" in any suit under the Act. 43 U.S.C. § 666(a). For this reason, the federal government may not be required to pay a fee to obtain a copy of a decree in proceedings under the McCarran Amendment.

The required fee constitutes a cost under § 666(a). Although the statute does not define the term "costs," 28 U.S.C. § 1920 defines costs taxable in "any Court of the United States," and is thus an indication of the kinds of costs Congress contemplated when it prohibited exaction of costs against the United States in McCarran Amendment proceedings. Section 1920 lists "[f]ees and disbursements for printing and witnesses" (§ 1920(3)), and "[f]ees for exemplification and copies of papers necessarily obtained for use in the case" (§ 1920(4)) as costs. The fee required by the bill is apparently intended to cover the cost of printing the decree,[2/] and is thus the kind of litigation cost contemplated by 28 U.S.C. § 1920 (3) and (4). Thus, the fee required by the bill is a cost under 43 U.S.C. § 666(a), which may not be charged against the United States.

II. The Right to Object at Both the TPD and Preliminary Decree Stages Should Be Preserved. -- The comments under this head are directed to the draft bill entitled "An Act Stating that the Water Courts Shall By Order Reopen and Review All Temporary Preliminary Decrees, Preliminary Decrees, and Final Decrees," etc. This bill would permit the reopening of previously entered decrees and allow persons to object to water rights included in those decrees. The draft also specifies that no objection seeking to relitigate "any matter previously litigated and resolved as the result of any previous objection

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2/ This is because the amount of the fee is set at "$20 or the cost of printing, whichever is greater ***."

process" is permitted, unless the objection comes from an Indian Tribe or federal agency "that had commenced negotiations" with the Compact Commission at the time when the matter was litigated, "in which case the tribe or agency is entitled to the benefits of the suspension provided under 85-2-217." See proposed § 1(2) and proposed § 85-2-233(1).

We object to the above-described language in the draft to the extent that it limits the right of any party, including the United States, to object to the same water right claim at both the temporary preliminary and preliminary decree stages. Under the Montana Water Use Act in its current form, there is a right to object at the preliminary decree stage. M.C.A. § 85-2-233. The statute does not restrict the right to object to the preliminary decree as a result of a previous objection to a TPD.

It would be unfair to the United States and other parties to the adjudication to limit the right to object to the preliminary decree. Persons may have failed to object at the TPD stage, justifiably relying on their statutory right to challenge claims at the preliminary decree level. As we read it, the draft bill could retroactively block such persons from objecting to claims in the preliminary decree, contrary to their reasonable expectations. See § 4 of proposed bill, providing for retroactive application.

The draft bill does have the salutary effect of subjecting previously entered TPD's and preliminary decrees to renewed scrutiny before they are transformed into final decrees. However, we submit that this is not an effective means of remedying the problem of inaccurate decrees.

In December of 1987, the United States filed a motion in the Water Court to address the problem of inflated and inaccurate claims embodied in temporary preliminary and preliminary decrees. (See attached copy of motion and supporting brief.) Our motion requested (1) an order directing DNRC to issue reports regarding the need for reexamination of claims (using the improved Claims Examination Rules) in those basins under TPD's or preliminary decrees, and (2) reexamination of claims in five specific basins not yet under decree. By order filed on May 10, 1988, the Water Court denied the second request and took under advisement the first.

We maintain that the surest manner in which to address the problem of inaccurate decrees is to grant the relief requested in our motion. To reopen old decrees for new objections puts the burden on the United States and other parties to investigate their neighbors' water claims, a role which, in general, the parties are not capable of performing adequately. As we noted in support of our motion, that critical role belongs primarily to DNRC. Only with thorough DNRC claims examination,

Ex. #8

3-20-89

conducted under the new Claims Examination Rules, can the process result in reasonably fair and accurate decrees of existing rights.

III. Other Comments. The draft bills at several points refer to "federal agencies" as the entities which hold water rights and object to the claims of other parties. (See, e.g., draft bill on reopening decrees, § 1(2).) The language should be changed to reflect that the United States holds water rights and makes objections on behalf of federal agencies and Indian Tribes.

In conclusion, we appreciate this opportunity to comment on the proposed legislation. We are confident that we share the same final goal - a full and fair adjudication of all waters within Montana.

Sincerely,

Hank Meshorer
by DJC

Hank Meshorer
Chief, Indian Resources Section
Land and Natural Resources
Division

Attachment

cc: Chief Judge Lessley (w/o attachment)

VISITORS' REGISTER

JUDICIARY COMMITTEE

BILL NO. SENATE BILL 169 DATE MARCH 20, 1989

SPONSOR SEN. BENGTSON

NAME (please print)	REPRESENTING	SUPPORT	OPPOSE
Alan McKelvey	FTBC		
Richard Aldrich	Dept of Ent		—
Ed Hart	MT Water Coal		
Jo Brunner	MWUA	✓	
Carol Mosher	Mt. Stockgrowers		
Marvin Barber	A P A	✓	

IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR WITNESS STATEMENT FORM.

PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.

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COMMITTEE OF THE WHOLE AMENDMENT
SENATE BILL 169
Representative Gary Spaeth

March 27, 1989 1:35 pm

Mr. Chairman: I move to amend SENATE BILL 169 (third reading copy -- blue).

Signed: Gary Spaeth
Representative Gary Spaeth

And, that such amendments to SENATE BILL 169 read as follows:

1. Page 4, line 4.
Strike: "CONCLUSIVE"
Following: "ENFORCEABLE"
Strike: ","

2. Page 4, lines 5 and 6.
Strike: "BY THE WATER JUDGE"

3. Page 7.
Following: "DECREE." on line 7
Strike: remainder of line 7 through end of line 11.
Insert: " However, a person may not raise an objection to a matter in a preliminary decree if he was a party to the matter when the matter was previously litigated and resolved as the result of an objection raised in a temporary preliminary decree, unless the objection is allowed for any of the following reasons:

(i) mistake, inadvertence, surprise, or excusable neglect;

(ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under M.R.Civ.P. Rule 59 (b);

(iii) fraud, misrepresentation, or other misconduct of an adverse party;

(iv) the judgment is void; or

(v) any other reason justifying relief from the operation of the judgment."

ADOPT

REJECT

SB 169

HOUSE

SENATE BILL NO. 169

INTRODUCED BY BENGTSON, GALT, STORY, STIMATZ, SPAETH, MARKS, BRADLEY, IVERSON

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT A WATER JUDGE MAY ISSUE A TEMPORARY PRELIMINARY DECREE ~~IN THOSE BASINS IN WHICH ADJUDICATION OF CLAIMS FOR FEDERAL OR INDIAN WATER RIGHTS IS PRECLUDED BY THE SUSPENSION OF ADJUDICATION UNDER 85-2-217~~ IF THE DECREE IS NECESSARY FOR THE ORDERLY ADJUDICATION OR ADMINISTRATION OF WATER RIGHTS; PROVIDING FOR OBJECTIONS AND HEARINGS ON TEMPORARY PRELIMINARY DECREES; INCREASING THE TIME LIMIT FOR REQUESTING A HEARING ON A TEMPORARY PRELIMINARY DECREE OR A PRELIMINARY DECREE; AMENDING SECTIONS 85-2-231 THROUGH 85-2-233 AND 85-2-235, MCA; AND PROVIDING AN EFFECTIVE DATE AND AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 85-2-231, MCA, is amended to read:

"85-2-231. ~~Preliminary~~ Temporary preliminary and preliminary decree. (1) A WATER JUDGE MAY ISSUE A TEMPORARY PRELIMINARY DECREE PRIOR TO THE ISSUANCE OF A PRELIMINARY DECREE IF THE TEMPORARY PRELIMINARY DECREE IS NECESSARY FOR THE ORDERLY ADJUDICATION OR ADMINISTRATION OF WATER RIGHTS.

~~(1)~~(2) (a) The water judge shall issue a preliminary decree. The preliminary decree shall be based on:

~~(a)~~(i) the statements of claim before the water judge;

~~(b)~~(ii) the data submitted by the department;

~~(c)~~(iii) the contents of compacts approved by the Montana legislature and the tribe or federal agency or, lacking an approved compact, the filings for federal and Indian reserved rights; and

~~(d)~~(iv) any additional data obtained by the water judge.

(b) The preliminary decree shall be issued within 90 days after the close of the special filing period set out in 85-2-702(3) or as soon thereafter as is reasonably feasible.

(c) This section does not prevent the water judge from issuing an interlocutory decree or other temporary decree, pursuant to 85-2-321 or as provided in subsection ~~(5)~~ (1) of this section, or if such a decree is otherwise necessary for the orderly administration of water rights prior to the issuance of a preliminary decree.

~~(2)~~(3) A preliminary decree may be issued for any hydrologically interrelated portion of a water division, including but not limited to a basin, subbasin, drainage, subdrainage, stream, or single source of supply of water, at a time different from the issuance of other preliminary decrees or portions of the same decree.

~~(3)~~(4) The preliminary decree shall contain the

information and make the determinations, findings, and conclusions required for the final decree under 85-2-234. The water judge shall include in the preliminary decree the contents of a compact negotiated under the provisions of part 7 that has been approved by the legislature and the tribe or federal agency.

~~(4)~~(5) If the water judge is satisfied that the report of the water master meets the requirements for the preliminary decree set forth in subsections (1) and (3)~~,~~ and is satisfied with the conclusions contained in the report, the water judge shall adopt the report as the preliminary decree. If the water judge is not so satisfied, he may, at his option, recommit the report to the master with instructions, or modify the report and issue the preliminary decree.

~~(5)--In--a--basin--in--which-adjudication-of-claims-for federal--or--Indian--water--rights--is--precluded---by---the suspension--of--adjudication-under-85-2-217,-the-water-judge may-issue-a-temporary-preliminary-decree-in-accordance--with the--requirements-of-this-section.-The-temporary-preliminary decree-shall-address-all-claims-in-the--basin--except--those affected-by-the-suspension-required-by-85-2-217.~~

(6) In issuing a subsequent preliminary decree, the water judge shall ~~use--the--temporary--preliminary--decree issued--under--subsection--(5).~~ INCORPORATE THE TEMPORARY

PRELIMINARY DECREE FOR THE BASIN AS MODIFIED BY OBJECTIONS AND HEARINGS. [THE TEMPORARY PRELIMINARY DECREE OR PRELIMINARY DECREE, AS MODIFIED AFTER OBJECTIONS AND HEARINGS, IS ~~CONCLUSIVE,~~ ENFORCEABLE~~,~~ AND ADMINISTRABLE ACCORDING TO ITS TERMS AMONG PARTIES ORDERED ~~BY--THE--WATER JUDGE~~ UNDER 85-2-406.] The preliminary decree, ~~when-issued~~ AS MODIFIED AFTER OBJECTIONS AND HEARINGS, shall UPON ISSUANCE supersede and replace the temporary preliminary decree."

Section 2. Section 85-2-232, MCA, is amended to read:

"85-2-232. Availability of temporary preliminary or preliminary decree. (1) The water judge shall send to the department a copy of ~~the~~ any temporary preliminary decree or preliminary decree ~~to-the-department~~ issued for a ~~subbasin~~ BASIN, and the water judge shall serve by mail a notice of availability of the temporary preliminary decree or preliminary decree to each person who has filed a claim of existing right within the decreed ~~subbasin~~ BASIN and to the purchaser under contract for deed, as defined in 70-20-115, of property in connection with which a claim of existing right has been filed within the decreed ~~subbasin~~ BASIN or, in the Powder River Basin, to each person who has filed a declaration of an existing right. The water judge shall enclose with the notice an abstract of the disposition of such person's claimed or declared existing right. The notice

of availability shall also be served upon those issued or having applied for and not having been denied a ~~beneficial water use~~ permit to beneficially use water within the decreed ~~subbasin~~ BASIN pursuant to Title 85, chapter 2, part 3, those granted a reservation within the decreed ~~subbasin~~ BASIN pursuant to 85-2-316, or other interested persons who request service of the notice from the water judge. The clerk or person designated by the water judge to mail the notice shall make a general certificate of mailing certifying that a copy of the notice has been placed in the United States mail, postage prepaid, addressed to each party required to be served notice of the temporary preliminary decree or preliminary decree. Such certificate shall be conclusive evidence of due and legal notice of entry of decree.

(2) Notice of the availability of a ~~temporary preliminary decree or~~ preliminary decree must also be published at least once each week for 3 consecutive weeks in at least three newspapers of general circulation which ~~in total~~ cover the water division or divisions ~~in the general stream basin~~ in which the decreed ~~subbasin~~ BASIN is located. THIS NOTICE MUST BE PROVIDED BEFORE THE FINAL DECREE FOR THE BASIN IS ISSUED.

~~(2)~~(3) Any person may obtain a copy of the temporary preliminary decree or preliminary decree upon payment of a

fee of $20 or the cost of printing, whichever is greater, to the water judge."

Section 3. Section 85-2-233, MCA, is amended to read:

"85-2-233. Hearing on temporary preliminary decree or preliminary decree. (1) (a) ~~Upon objection to the~~ For good cause shown, a hearing shall be held before the water judge on any objection to a temporary preliminary decree or preliminary decree by:

(i) the department~~,~~;

(ii) a person named in the temporary preliminary decree or preliminary decree~~,~~; ~~or~~

(iii) any ~~other~~ person~~,--for--good--cause--shown,--the department--or--such--person--is--entitled--to--a--hearing--thereon before--the--water--judge,~~ within the ~~subbasin~~ BASIN entitled to receive notice under 85-2-232(1); or

(iv) any other person who claims rights to the use of water from sources in other ~~subbasins~~ BASINS that are hydrologically connected to the sources within the decreed ~~subbasin~~ BASIN and who would be entitled to receive notice under 85-2-232 if his claim or claims were from sources within the decreed ~~subbasin~~ BASIN.

(b) ~~No objection seeking to reopen and review any matter previously litigated and resolved as the result of any previous objection process is allowed, unless the objection is by an Indian tribe or federal agency that~~

~~commenced--negotiations--pursuant-to-85-2-702-or-85-2-703-at the-time-the-matter-was-litigated.--A-tribe-or-federal-agency that-commenced-negotiations--at--the--time--the--matter--was litigated--is--entitled--to--the--benefits-of-the-suspension provided-under-85-2-217.~~ A PERSON DOES NOT WAIVE THE RIGHT TO OBJECT TO A PRELIMINARY DECREE BY FAILING TO OBJECT TO A TEMPORARY PRELIMINARY DECREE. ~~HOWEVER, A PERSON MAY NOT RAISE AN OBJECTION TO A MATTER IN A PRELIMINARY DECREE IF HE WAS A PARTY TO THE MATTER WHEN THE MATTER WAS PREVIOUSLY LITIGATED AND RESOLVED AS THE RESULT OF AN OBJECTION RAISED IN A TEMPORARY PRELIMINARY DECREE.~~

~~(c) A PERSON WHO HAS RECEIVED NOTICE OF THE AVAILABILITY OF A TEMPORARY PRELIMINARY DECREE WAIVES THE RIGHT TO OBJECT TO THE ENFORCEMENT OF THE TEMPORARY PRELIMINARY DECREE UNDER 85-2-406 IF HE FAILED TO OBJECT TO A TEMPORARY PRELIMINARY DECREE.~~ HOWEVER, A PERSON MAY NOT RAISE AN OBJECTION TO A MATTER IN A PRELIMINARY DECREE IF HE WAS A PARTY TO THE MATTER WHEN THE MATTER WAS PREVIOUSLY LITIGATED AND RESOLVED AS THE RESULT OF AN OBJECTION RAISED IN A TEMPORARY PRELIMINARY DECREE, UNLESS THE OBJECTION IS ALLOWED FOR ANY OF THE FOLLOWING REASONS:

(I) MISTAKE, INADVERTENCE, SURPRISE, OR EXCUSABLE NEGLECT;

(II) NEWLY DISCOVERED EVIDENCE THAT BY DUE DILIGENCE COULD NOT HAVE BEEN DISCOVERED IN TIME TO MOVE FOR A NEW

TRIAL UNDER RULE 59(B) MONTANA RULES OF CIVIL PROCEDURE;

(III) FRAUD, MISREPRESENTATION, OR OTHER MISCONDUCT OF AN ADVERSE PARTY;

(IV) THE JUDGMENT IS VOID; OR

(V) ANY OTHER REASON JUSTIFYING RELIEF FROM THE OPERATION OF THE JUDGMENT.

(2) If a hearing is requested, ~~such~~ the request must be filed with the water judge within ~~90~~ 180 days after ~~notice of~~ entry of the temporary preliminary decree or preliminary decree. The water judge may, for good cause shown, extend this time limit as up to two additional ~~90~~ days 90-day periods if application for ~~the~~ an extension is made ~~within 90--180--days--after--notice--of--entry--of--the temporary--preliminary-decree-or-preliminary-decree~~ PRIOR TO EXPIRATION OF THE ORIGINAL 180-DAY PERIOD OR ANY EXTENSION OF IT.

(3) The request for a hearing shall contain a precise statement of the findings and conclusions in the temporary preliminary decree or preliminary decree with which the department or person requesting the hearing disagrees. The request shall specify the paragraphs and pages containing the findings and conclusions to which objection is made. The request shall state the specific grounds and evidence on which the objections are based.

(4) Upon expiration of the time for filing objections

and upon timely receipt of a request for a hearing, the water judge shall notify each party named in the temporary preliminary decree or preliminary decree that a hearing has been requested. The water judge shall fix a day when all parties who wish to participate in future proceedings must appear or file a statement. The water judge shall then set a date for a hearing. The water judge may conduct individual or consolidated hearings. A hearing shall be conducted as for other civil actions. At the order of the water judge a hearing may be conducted by the water master, who shall prepare a report of the hearing as provided in M.R.Civ.P., Rule 53(e).

(5) Failure to object under subsection (1) to a compact negotiated and ratified under 85-2-702 or 85-2-703 bars any subsequent cause of action in the water court.

(6) If the court sustains an objection to a compact, it may declare the compact void. The agency of the United States, the tribe, or the United States on behalf of the tribe party to the compact shall be permitted 6 months after the court's determination to file a statement of claim, as provided in 85-2-224, and the court shall thereafter issue a new preliminary decree in accordance with 85-2-231; provided, however, that any party to a compact declared void may appeal from such determination in accordance with those procedures applicable to 85-2-235, and the filing of a

notice of appeal shall stay the period for filing a statement of claim as required under this subsection."

SECTION 4. SECTION 85-2-235, MCA, IS AMENDED TO READ:

"**85-2-235. Appeals from final decree.** A person whose existing rights and priorities are determined in the final decree may appeal the determination only if:

(1) he requested a hearing and appeared and entered objections to the temporary preliminary decree or the preliminary decree; or

(2) his rights or priorities as determined in the temporary preliminary decree or the preliminary decree were ~~altered~~ affected as the result of ~~a hearing requested~~ an objection filed by another person."

NEW SECTION. **SECTION 5.** COORDINATION INSTRUCTION. IF SENATE BILL NO. 166 [LC 684] IS NOT PASSED AND APPROVED, THE BRACKETED LANGUAGE IN [SECTION 1 OF THIS ACT] IS VOID.

NEW SECTION. **Section 6.** **Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 7.** **Effective date.** [This act] is effective on the latest date on which any of the following occur:

(1) passage and approval of [this act], __Bill No.__ [LC 684], ~~---Bill No.--- [LC 685]~~, or __Bill No.__ [LC 686]; or

(2) a final determination of failure to receive passage and approval of __Bill No.__ [LC 684], ~~---Bill No.--- [LC 685]~~, or __Bill No.__ [LC 686].

NEW SECTION. **Section 8. Applicability.** [This act] applies to any temporary preliminary decree or preliminary decree issued on or after [the effective date of this act].

-End-